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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session

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01-61790 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session

1. **Mr. Yamada** (Japan) said that his delegation supported the draft articles on transboundary harm from hazardous activities. The draft struck a balance between the freedom of States to engage in activities not prohibited by international law and the limitation of such freedom owing to environmental considerations and international cooperative arrangements. It gave due consideration to the positions of both the State of origin and the State likely to be affected. Japan welcomed the introduction in draft article 19 of recourse to an impartial fact-finding commission within the framework of dispute settlement.

2. With regard to the form of the draft articles, the Government of Japan supported the recommendation made by the Commission to the General Assembly on the elaboration of a convention. His delegation proposed that each State should take a few years to study the draft articles and that the Sixth Committee, meeting as the Committee of the Whole, should then elaborate and adopt the draft articles as a convention on prevention of transboundary harm from hazardous activities.

3. Now that the Commission had completed its work on prevention of transboundary harm from hazardous activities, it should proceed with the larger, essential topic of international liability with regard to such activities. It was impossible to eliminate the risk of transboundary harm from those activities. Furthermore, the State likely to be affected could not prevent the State of origin from conducting activities which might cause transboundary harm. Also, there could be cases where States of origin failed to observe the provisions of the draft articles and caused damage to other countries.

4. International liability could relate to various fields of international law, and since each of the various categories might need specific consideration, it would be difficult to codify a general rule. However, rules must be developed to deal with the injurious consequences arising out of acts not prohibited by international law. The Commission should take a few years to study the question, decide whether codification was feasible and, if so, specify the scope of the work that would be required. Japan hoped that the General Assembly would adopt a resolution as recommended by the Commission.

5. **Mr. Dinstein** (Israel) said that the prevention of transboundary harm from hazardous activities was one of the most important aspects of international environmental law, since it dealt not with remedies but with risk assessment and prophylactic measures. The Commission had been justified in its decision to give precedence to prevention over compensation.

6. The issue at the root of the Commission's work was one of clashing sovereignties. On the one hand, the State of origin exercised full sovereignty in its territory and in general should be the arbiter of what activities ought to take place within its jurisdiction. On the other hand, international law did not allow sovereignty to be exercised arbitrarily in a manner disregarding the rights of other sovereign States. The State likely to be affected by hazardous activities originating abroad should be able to protect its sovereign domain from injury. Dispute management could only be accomplished by balancing the conflicting interests of the two States concerned in such a way as to prevent or at least minimize the risk of transboundary harm. That was manifestly the purpose of the draft articles, which had the full support of the Israeli delegation.

7. The core of the text was the duty of the States concerned to cooperate in good faith and, if necessary, to seek the assistance of a competent international organization (art. 4). Without diminishing the importance of protecting persons and property in the affected State, it was worthwhile emphasizing the risk to the environment which could be a matter of global significance. An adverse impact on the quality of the environment could not be measured in pecuniary terms, and prevention of harm must take precedence over any procedure for assessing damage after a disaster. In the present day and age, nobody would dare to deny that protection of the environment must override traditional concepts of sovereignty.

8. By the same token, his delegation would like to stress that the obligation of the States concerned to cooperate in good faith in the prevention of transboundary harm must transcend any tensions that might sour their relations at the political level. Where direct channels of inter-State communication were unavailable or ineffective, the good offices of third parties or international organizations should be available and utilized for the greater good of humankind. His delegation construed article 8 of the draft to mean that the timely notification which the State of origin was bound to give to a State likely to be affected had to be issued irrespective of political tensions. Should a direct

notification of that sort prove to be politically impractical, the State of origin would be obligated to provide the notification to a third party or a competent international organization, which, for its part, would convey it to the affected State.

9. **Ms. Quezada** (Chile) said it was vital to regulate international liability for acts not prohibited by international law, in order to fill the legal gap left by responsibility for wrongful acts. That was particularly true in the environmental field, where many potentially hazardous activities were not unlawful.

10. The draft articles dealt with one aspect of the question which was certainly fundamental, namely the prevention of transboundary harm, but they should also have dealt with the equally vital issues of liability and the obligation to compensate. The absence of a wrongful act did not mean that the act committed did not entail liability or the obligation to compensate. In the case of responsibility for wrongful acts, compensation was required even in circumstances precluding wrongfulness (art. 27 (b)).

11. Her delegation was also concerned because the draft articles covered only harm caused within certain legal entities, namely territories or other places under the jurisdiction or control of a State, and disregarded common spaces such as the high seas or the seabed. Since the environment was a global concept, it would be appropriate to consider setting up an international body which would be responsible for monitoring the environment in areas not under the jurisdiction of any State, and for conducting public activities at the international level.

12. With regard to the text proper, her first comment concerned the distinction between the activities covered by the draft articles and those which caused actual direct harm by the mere fact of being undertaken. Admittedly, if the purpose of the draft was prevention, it must allow preventive measures against activities likely to cause harm. However, that did not exclude the possibility of incorporating in the draft all aspects of liability, including compensation and restitution. Similarly, her delegation considered it appropriate to have a general definition of the activities covered by the draft, rather than a list of a priori definitions, which would soon be outdated because of the pace of scientific and technical progress.

13. Concerning the rule laid down in article 8, it should be made clear that if the State which had received the notification did not react, authorization was deemed to have been given under the terms laid down by the State of origin. That did not, however, release the latter State from the obligation to avoid causing any harm. With regard to article 9, it was important not to prevent an activity from being carried out because of lack of agreement between the States concerned. Nevertheless, the State of origin was bound to take account of the observations made by the other State during consultations. The rule established in article 9 would make it possible to achieve a balance between States when agreement between them was lacking.

14. Article 10 dealt with the extremely important subject of an equitable balance between the interests of the States concerned. Account should be taken of the level of development of States when considering the cost involved, and the technical and financial resources required, in dealing with the risks arising from the hazardous activity. Subparagraph (d) did not seem adequate in that respect, since it referred to the costs which States were "prepared to contribute", not those which they were "able to contribute". That was a matter referred to in the Stockholm and Rio Declarations and in the Montreal Protocol on Substances that Deplete the Ozone Layer. The same principle should apply to due diligence. States would not be released from their obligations under the draft articles, but the obligations would be limited. At all events, the basic principle to be applied should be the "polluter pays" principle. Subparagraph (f) was important because an affected State would not be able to impose on the State of origin rules of prevention more stringent than those applied to comparable activities under its own internal law.

15. With regard to article 13, it was undoubtedly necessary to inform the public about the activities and the risks involved, but that should be done in accordance with national rules. The same applied to the consultations envisaged, which should not take the form of an international consultation. At all events, the persons affected should have access to remedies for any damage sustained.

16. Article 18, a saving clause, was relevant but not sufficiently explicit, since it did not specify the obligation concerned. Her delegation took it to refer to obligations of a similar or identical kind. Article 19 warranted a formal comment: there was no need to spell out the means of dispute settlement, since they were all covered by "peaceful means of settlement". The six-month waiting period specified in paragraph 2 was too long for negotiating a settlement, and should be reduced. The fact-

finding commission mentioned in that paragraph seemed to be out of place, since it was not an appropriate mechanism except where there was a divergence of views on the facts, which was not always the case. When the disputes had to do with questions of law, such a mechanism would not be appropriate unless it was given the functions of a conciliation commission.

17. Lastly, her delegation considered that preventive measures were not sufficient. Rules were needed to provide compensation where harm had been sustained. The Commission should therefore tackle those issues with a view to completing its work.

18. **Mr. Roth** (Sweden), speaking also on behalf of Denmark, Finland, Iceland, Norway and referring to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, said that in the first place, the term "significant" could be questioned as a criterion for applicability. Second, the obligation of prevention should apply also to risks to areas outside of national jurisdiction. Third, the reference to environmental impact assessments in article 7 should be stronger. Fourth, with regard to article 10, there was a risk that parties might have different views of what constituted an "equitable balance of interests"; a strong dispute settlement clause would be needed. Furthermore, the factors involved in an equitable balance of interests could in no way prejudice the right to compensation if harm occurred. In such a situation, the "polluter pays" principle should apply. The precautionary principle, implied in subparagraph (c), was not set out with sufficient clarity. Fifth, article 13 should be strengthened to ensure that the public too was able to present views. Sixth, there should be an element of proportionality in article 14. In certain circumstances, even information that could legitimately be considered secret might have to be made public. Seventh, it might be appropriate to consider whether a duty to take response action should be included, either in the draft articles on prevention or in a second set of draft articles dealing with liability. Eighth, the dispute settlement clause in article 19 was too weak; arbitration and judicial settlement should be given a bigger role.

19. As to the final form of the document, the Nordic countries were quite flexible. However, they felt that merely adopting the draft articles as they stood was not appropriate. They should be discussed and be open to amendments. The text could subsequently be adopted in whatever form the Commission decided, although for reasons of legal certainty, a convention would be preferable, even though the negotiations might be difficult and time-consuming.

20. A document that would cover both prevention and the various aspects of liability, such as compensation, would be preferable. Indeed, compensation, which might be necessary in and of itself, could also have a preventive function. It was difficult to foresee how the complete regime would work without knowing what the compensation scheme would look like.

21. The views of the Nordic countries on the question of liability were the following: there should be a duty to take response action, as well as a duty of reinstatement, where possible; there should be a duty to pay compensation to cover all damage to persons and property; the "polluter pays" principle should be applied as a general rule; injured persons should have access to justice in appropriate courts, but there should also be liability for the State itself, residually in cases where there was no operator liability.

22. Turning to the question of reservations to treaties, he said that the tendency towards decreasing numbers of reservations was important. To promote that trend, it was important for States to express objections to reservations which in their view undermined the integrity of a treaty. It was regrettable that the issue of reservations incompatible with the object and purpose of the treaty still had not been considered by the Special Rapporteur in his reports to the Commission; he should give the highest priority to that issue in his future work.

23. The competence to formulate reservations at the international level should not be extended. The integrity of article 7 of the Vienna Convention on the Law of Treaties must be respected; the circle of persons who were considered as representing their State was well established and should not be altered. In that context, a distinction should be made between the reservations under internal law and reservations at the international level. The matter of competence to formulate reservations and interpretative declarations at the internal level was clearly a matter for internal law and should not concern the Commission.

24. Lastly, the Nordic countries were concerned about the effect of draft guidelines 2.3.1 and 2.3.2, which would make the whole regime of treaty reservations applicable also to so-called late reservations. That would be in contradiction with the basic definition of a reservation and entailed a serious risk of abuse.

The meeting rose at 4 p.m.

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Summary record of the 18th meeting
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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61960 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Prandler** (Hungary) welcomed the results achieved by the International Law Commission in its discussions of the topic "International liability for injurious consequences arising out of acts not prohibited by international law", especially the adoption of the final text of a draft preamble and 19 articles on prevention of transboundary harm from hazardous activities, and the commentaries thereto.

2. His delegation endorsed the refinements made by the Commission during its second reading of the draft text. It agreed with the inclusion of a reference to "hazardous activities" in the title of article 1 and to the need to assess environmental impacts in article 7. It also welcomed the addition of the new paragraphs 3, 4 and 5 to article 19.

3. As to the structure of the draft articles, his delegation considered that the provision in article 11, paragraph 3, on the procedures applicable in the absence of notification, should be inserted between paragraphs 2 and 3 of article 9, on consultations on preventive measures. As noted in paragraph (7) of the commentary to article 9, that article might be invoked as a result of article 8, or in the course of the exchange of information under article 12, or in the context of article 11. Thus, in accordance with article 9, consultations might take place either before authorization and the commencement of a hazardous activity, or while it was being performed.

4. Although article 19 had been improved by the addition of new paragraphs 3, 4 and 5, providing for a compulsory procedure for the establishment of a fact-finding commission, the text of the article, as it stood, was not entirely satisfactory. His delegation would have preferred it to include, mutatis mutandis, all the provisions of article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, including paragraph 10, which envisaged the possibility of a compulsory settlement of disputes by the International Court of Justice or through arbitration if, at the time of ratification, acceptance or approval of the Convention, the parties made a declaration of acceptance of compulsory jurisdiction. Hungary had made such a declaration at that time.

5. Turning to the question of the final form of the draft articles, he said that his delegation did not object, in principle, to the recommendation of the International Law Commission that the General Assembly should elaborate and adopt a convention on the basis of the draft, since various national legislations and multilateral treaties concerning the environment and environmental protection clearly indicated the existence of a customary rule of international law on the prevention of transboundary harm. Hungary would therefore be prepared to work on refining the draft articles in an appropriate setting within the Sixth Committee.

6. On the question of an international regime of liability, his delegation wished to emphasize the tripartite relationship between hazardous activities, the duty to exercise due diligence in discharging the obligations relating to prevention, and the question of liability. The development of a clear set of rules on liability was a sine qua non for the establishment of an appropriate regime for transboundary harm. In accordance with paragraph 7 of General Assembly resolution 55/152, the Commission had a clear obligation and duty to resume its work on the question of liability, in order to facilitate the future adoption of a comprehensive convention in that field. He was disappointed that the report of the Commission did not say whether it intended to deal with that question in the future. If, as it seemed, some members of the Commission had doubts about developing an adequate regime of liability, his delegation would wish to know the reasons, in order to examine and discuss them.

7. With a view to contributing to the future work of the Commission, he said that his delegation fully endorsed the concept of liability as a duty to repair transboundary harm incurred by the operator or the State of origin without regard to the wrongfulness of its conduct under international law.

8. When industrial activities led to transboundary environmental risk and harm, the principle of sovereign equality of States called for an effective regime of liability, which should be based on an understanding that the affected State would be compensated for any harm arising from an activity carried out in the territory of the State of origin. If there existed in addition to a preventive regime, an adequate liability regime focusing on compensation for damage, States would more readily accept hazardous activities with possible transboundary harm in the States of origin.

9. The Government of Hungary had undertaken a comprehensive review of its bilateral agreements with neighbouring countries in the area of environmental protection and water management, with a view to revising and updating those agreements, where necessary, and to ensuring that the States parties assumed responsibility to compensate for all transboundary harm to the other Party. Likewise, in 1999 Hungary had launched a regional environmental initiative aimed at the elaboration and adoption by Central and Eastern European countries of a binding international legal instrument that would provide for State liability for environmental harm and guarantee greater protection of the environment at the regional level.

10. His delegation hoped that the "polluter pays" principle would be widely included in regional and international legal instruments on environmental protection. Hungary had incorporated into its domestic legal system recent conventions adopted under the auspices of the United Nations Economic Commission for Europe, including the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, in which the above-mentioned principle had been acknowledged as a general principle of international environmental law. In that connection, States Parties to the latter Convention had agreed in 2000 on the elaboration of a protocol on the concepts of responsibility and liability, as proposed by Switzerland. In July, the Parties meeting in Geneva had decided to start negotiations on such a protocol, within the framework of the Economic Commission for Europe.

11. Particular attention should also be given to efforts aimed at the establishment, within the European Union, of a community law regime on liability in the area of the environment, as envisaged by the white paper on environmental liability adopted by the European Commission the previous February. The regime on liability would serve to improve the application of the "polluter pays" principle and other environmental principles laid down in the relevant constituent treaties of the European Community.

12. **Mr. Wickremasinghe** (United Kingdom) said that the draft articles on the prevention of transboundary harm from hazardous activities represented a valuable contribution to that area of law. In particular, the core obligation on prevention contained in article 3 provided a sound foundation for the draft as a whole.

13. It remained unclear how the obligation of prevention related to the requirement for an equitable balancing of interests, as provided in articles 9 and 10. His delegation would be concerned if the concept was interpreted in such a way as to undermine that obligation. Fortunately, article 18 provided that those articles were without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

14. With regard to the Commission's recommendation that the General Assembly should elaborate and adopt a convention on the basis of the draft articles, he said that his delegation would be prepared to consider that possibility if broad support for a universal convention on the topic existed. However, in the light of the experience of the Convention on the Law of the Non-Navigational Uses of International Watercourses, which was still far from its entry into force, the negotiation of a convention was not necessarily the most effective use to which the work of the Commission could be put. Instead, the General Assembly might adopt a resolution recommending that States should be guided by the draft articles in the conduct of their relations and in particular when negotiating relevant agreements at both the bilateral and multilateral levels.

15. The fact that the Commission had concluded its work on the prevention of harm vindicated the Commission's decision to focus on that aspect of the topic of international liability. His delegation recommended that before the Commission decided whether or not to return to liability issues, it might survey the various treaties which dealt with those issues and ongoing projects in other forums. Such a survey would provide an opportunity for the Commission to draw lessons from the successes and failures of those instruments and to consider what work of genuine value it could undertake.

16. Turning to the topic of reservations to treaties, he said that his delegation supported the progress made at the recent session and commended the Special Rapporteur for having reconsidered the need for additional guidelines on conditional interpretative declarations. On previous occasions, it had expressed real doubt as to whether a category of conditional interpretative declarations could truly be said to exist

independently of reservations, and it had urged the Special Rapporteur to consider the question of definition in substantive rather than formal terms.

17. The Special Rapporteur had taken a restrictive approach in draft guidelines 2.3.1 to 2.3.3 on the late formulation of reservations. As a general rule, late reservations were impermissible and the practice should not be encouraged.

18. The role of the depositary was an important but difficult area, and the guidelines, as a non-binding instrument, should encourage depositaries to adopt a uniform practice. The crux of the matter was the acceptance of reservations and objections to them, and his delegation looked forward to the Special Rapporteur's next report in that regard.

19. With respect to the topic of unilateral acts of States, the Special Rapporteur seemed to share his delegation's view that an attempt to develop a body of rules applicable to all unilateral acts was not well founded.

20. Lastly, on the subject of diplomatic protection, his delegation noted the steady progress made in relation to the rule of continuous nationality and the exhaustion of local remedies. It appreciated work on the topic done by the Special Rapporteur, both for the clarity of his analysis and his open-minded approach.

21. **Mr. Galicki** (Poland) said that his delegation attached great importance to the draft articles on prevention of transboundary harm from hazardous activities and fully associated itself both with the obligation of prevention, appearing in article 3, and with the principle expressed in the preamble that the freedom of States to carry out or permit activities in their territory or otherwise under their jurisdiction or control was not unlimited.

22. The Commission had made the right choice four years previously in deciding to deal first with the issue of prevention, which should be the preferred policy, since, as the commentary to the draft articles stated, "prevention as a policy is better than cure". The scope and form of the draft articles could, however, be improved and strengthened and a decision on developing future articles on the general topic of liability should be reached.

23. His delegation was of the view that the territorial scope of the application of the draft articles should not be limited to the harm caused to areas within a national jurisdiction. The definition of "transboundary harm", contained in article 2, subparagraph (c), seemed too narrow, while failing to solve the question of harm caused to areas beyond a State's national jurisdiction or control. Bearing in mind that the definition of "harm" in article 2, subparagraph (b), also included harm caused to the environment, it seemed that it would be in the interests of the international community as a whole to extend the operation of preventive protection to the environment, without limit of State boundaries. It would also be useful to consider whether the obligations concerning prevention should be exclusively procedural in nature, as was currently proposed, or should — as had already been suggested — include substantive requirements to mitigate or prevent certain impacts. His delegation would favour the latter approach.

24. His delegation's second observation related to the form that the draft articles would take. It fully endorsed the Commission's recommendation to the General Assembly that a convention should be elaborated on the basis of the draft articles. Although there already existed a number of regional environmental agreements, and others were being negotiated, there was a clear need for a universal instrument dealing with the problem on a global scale. The draft articles represented a notable attempt at the progressive development of international law and, as such, deserved to be reflected in the form of a universally binding treaty. That option, which was his delegation's preferred choice, did not preclude the possibility, in practice, of following the pattern applied in the case of nationality in relation to State succession, with the General Assembly taking note of the draft articles with a view to their further elaboration in the form of a convention. The draft articles would be annexed to the General Assembly resolution, together with a recommendation that the text should be widely disseminated. Such a solution would protect and preserve in the best possible way what had been done in the past and what could be done in the future in the field of international legal regulations concerning the prevention of transboundary harm from hazardous activities.

25. With regard to the possibility of continuing the general topic of international liability for injurious consequences arising out of acts not prohibited by international law, he recalled that the Commission had included the topic in its agenda in 1978, separately

from the topic of responsibility, and later, in 1992, had decided to continue the work in stages, first completing its work on prevention of transboundary harm and then proceeding with remedial measures. Although the first stage of the Commission's work seemed to have been successfully completed, his delegation questioned whether the Commission's work on the topic of liability should be discontinued. That approach hardly seemed the best solution. Poland was, like some other States, committed to the continuation of the Commission's work on the issue of liability for acts not prohibited by international law, since the General Assembly discussion on the elaboration of a convention on prevention simultaneously with the Commission's consideration of the issue of liability would be of great significance for the codification and progressive development of international law in what was a very important field of contemporary international relations.

26. **Mr. Grigg** (Australia) said that his delegation supported the Commission's recommendation to the General Assembly that work should commence on the elaboration of a convention on the basis of the draft articles, which, since they incorporated established principles of environmental protection, provided a sound foundation for the elaboration of a convention on the prevention of transboundary harm from hazardous activities. With regard to certain provisions of the draft articles, he noted that their application was not limited to situations of transboundary harm between States with common land boundaries, as article 2, subparagraph (c), clearly showed. Australia, as an island State, considered it particularly important that there should be a recognition that the articles applied also to transboundary harm across maritime boundaries, including adjacent exclusive economic zones, and to situations where harm was caused in the territory of one State by activities in another, where those States did not have any common boundaries. Accepting that transboundary harm was often regional in character, his delegation wished to record its understanding that the phrase "competent international organization" in article 4 should be interpreted as including relevant regional organizations. Similarly, his delegation believed that States should be encouraged to include regional organizations in their monitoring methods under article 5. He noted that the draft articles would require further work if a convention was to be drafted. In article 3 on prevention, for example, his delegation, while acknowledging the necessity of maintaining flexibility in the definition of preventive measures to be taken, considered that the concept of "appropriate measures" should be more precisely defined. Moreover, although the purpose and meaning of article 6 on authorization was clear from the commentary, it might be useful to clarify the language of the provision to reflect more precisely that it was the State of origin that granted authorization to an entity which intended to undertake or was undertaking a potentially hazardous activity. As for article 19, on the settlement of disputes, his delegation found it satisfactory, insofar as it provided for the choice of settlement by mutual agreement and, failing such agreement, provided recourse to an impartial fact-finding commission.

27. **Mr. Gómez Robledo** (Mexico), referring to the future work of the Commission, said that the Commission should begin a study of the second part of the topic, since the General Assembly could not limit itself to adopting an instrument on "international liability for injurious consequences arising out of acts not prohibited by international law" without including a set of rules specifically referring to the core of the topic. At its current session, the Assembly should simply take note of the draft articles and the Commission, in accordance with its mandate under paragraph 7 of General Assembly resolution 55/152 of 12 December 2000, should resume consideration of the liability aspects of the topic. Once a complete draft had been produced, the Committee could take the necessary measures to ensure that the fruit of the Commission's labour was transformed into a binding legal instrument. To that end, he urged States which had not yet done so to give the Commission written comments dealing specifically with the issue of liability. Although the obligations to prevent and to repair in cases of transboundary harm were different, the two were clearly interrelated. There were various arguments in favour of the Commission's continuing with the second part of the topic: principle 13 of the Rio Declaration mentioned the need to cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for environmental damage. The mere existence of a liability regime would serve as a preventive by discouraging activities that caused harm to individuals and to the environment; as the Commission had noted, the ecological unity of the planet did not correspond to political boundaries and therefore transboundary harm had consequences that went beyond the States directly

concerned. It was a question of justice and equity, since it would clearly be unfair to allow the burden of covering the costs of compensation to be transferred to the victims and affected States, and there were a variety of international regimes which dealt with different aspects of the attribution or channelling of liability for harm and should serve as a source of inspiration for the Commission's work. All those regimes referred, generally speaking, to civil liability and had chosen to channel strict liability to the operator of the activity in question. However, it was important to take into account the fact that some of those regimes envisaged the State's liability as residual or supplementary in cases where the operator did not cover the entire amount of the compensation. There were also alternative approaches under which States participated in compensation by contributing to indemnity funds created for those cases where the operator did not cover the entire amount. Another innovative source of inspiration was the work carried out within the framework of the Cartagena Protocol on Biosafety to the Convention on Biodiversity.

28. The draft articles reflected the current rules of customary international law in that area and included a detailed set of substantive and procedural rules concerning the duty of all States to take appropriate measures to prevent significant transboundary harm and to cooperate in good faith to that end.

29. The Commission had rightly sought to balance the need to ensure that the State of origin was not prevented from carrying out its activities by potentially affected States; it had also recognized that States freedom to carry out and authorize activities within their territory was not unlimited. The Commission had been wise to make the obligations of prevention and cooperation of a continuous nature. He also welcomed article 11 (Procedures in the absence of notification).

30. However, several elements should be explicitly included in the draft while others should be dealt with in greater detail. The scope of the draft articles was limited in two respects: first, the title of the draft, which focused on hazardous activities; and, second, the content of article 1. It was important for the draft to apply to a broad range of activities, including, as a guide, those covered by the 1993 Lugano Convention. Those limitations should not prejudice the setting of future restrictions on other activities which were not covered by the draft but which might entail the threat of transboundary harm. The draft took a bilateral or purely inter-State approach linked to the concepts of territory and jurisdiction; it did not deal with potential harm to the environment as a whole, particularly in areas outside any national jurisdiction. Thus, there was a need for continued work in that area to ensure that the obligation of prevention was applied effectively to all hazardous activities, regardless of where they were carried out or of the geographical area on which they had an impact.

31. Another cause for concern was the relationship between the obligation of prevention and the precautionary principle, to which explicit reference should be made in the draft in order to demonstrate more clearly how it related to the obligation of prevention. The precautionary principle was also a relevant factor in implementing the definitions of "risk of causing significant transboundary harm" and "State likely to be affected", which appeared in article 2. In addition, that principle should be considered not only as part of the general context of implementation of articles 3 and 10, but also as relevant in the specific context of articles 6 and 7. His delegation would have liked article 10 to include specific mention, at least in the commentary, of the risks to vulnerable elements of biodiversity. It would also have preferred an explicit reference to the global impact on agriculture of risks affecting centres of origin and genetic diversity. However, the list contained in the article was not exhaustive, and the States concerned could take more factors into account. His delegation considered that the implementation of article 14 (National security and industrial secrets) did not affect the type of information to be provided under article 17 (Notification of an emergency). Lastly, the Commission had shown excessive caution in the case of article 19 (Settlement of disputes) by proposing an impartial fact-finding commission as the only mechanism in cases where the parties could not agree. While he was in favour of that as the convention's primary approach, he would have preferred the draft to include, as a second stage, other dispute-settlement mechanisms binding on the parties, which his delegation considered necessary, given the type of dispute which could trigger implementation of the draft articles.

32. **Ms. Geddis** (New Zealand) said that, in her delegation's view, the draft articles were valuable in focusing on the main aspect of the topic: the duty of a State to take preventive action where activities in areas within its jurisdiction risked causing adverse

consequences to another State. The text of the draft articles had been tightened up and improved during the Commission's deliberations at its fifty-third session and provided a valuable framework of key provisions governing the obligations that should apply to States in whose territory or in areas of whose jurisdiction hazardous activities were undertaken. Elements of the draft articles that her delegation considered particularly useful were: the clear statement of the obligation of States of origin to take all appropriate measures to prevent significant transboundary harm; the clear application of the articles to activities (not prohibited by international law) that involved a risk of causing significant transboundary harm through their physical consequences; the elaboration of a set of factors to be used in the equitable balancing of interests in finding solutions where problems arose; the establishment of notification and consultation procedures in respect of activities involving a risk of causing significant transboundary harm; and the elaboration of a dispute settlement mechanism for the resolution of disputes, including recourse to an independent fact-finding commission.

33. Her delegation saw scope for a further evolution of thinking in two key areas, however. First, it was important to recognize that transboundary harm could take a number of forms, including economic loss. If the scale of the possible physical consequences was large enough, even though the probability might be low, harm could result from the risk, even if no physical consequences occurred. In such a situation, harm could result from the perception of the potential physical consequences of a particular activity. It was for that reason that the draft articles on prevention necessarily emphasized the need for remedial measures to take account of the risk involved and prevent actual damage occurring.

34. Secondly, it was important not to restrict risk situations artificially to those where there was a high probability of significant transboundary harm or a low probability of disastrous transboundary harm. There could be medium-risk situations in which preventive action might be justified and the question was not whether such action was necessary so much as what action should reasonably be taken, and which equitable factors might be important.

35. With regard to the Commission's recommendation that a convention should be elaborated on the basis of the draft articles, her delegation considered that there was a need to weigh carefully the close relationship between the prevention and liability aspects of the topic. There could be little question that prevention should be a preferred policy, as noted in paragraph 2 of the general commentary. Risk assessment, prevention activities and response preparedness were of critical importance and the draft articles constituted a major step forward in that direction. It should be borne in mind, however, that where activities were intrinsically hazardous, harm — and serious harm — would on occasion result. A way must therefore be found of ensuring that the resulting loss did not fall entirely on the affected State. That required the elaboration of legal principles to provide both for the effective liability of the responsible operator and for the residual liability of States where there was no effective operator liability. That second aspect of the topic should also be covered by the draft articles.

36. Having regard to all those reasons, the Committee should welcome the conclusion of the draft articles but reserve further action for the time being, both to allow some reflection on the issue and, more important, to allow work on the question of liability to be taken forward. The Commission's work on liability could then be informed by the work on the draft articles on prevention, and vice versa. Furthermore, the interdependence of the two topics constituted a strong case for the negotiation of a single convention dealing with both prevention and liability, which were two parts of a single whole.

37. **Mr. Estévez-López** (Guatemala) supported the recommendation by the representative of the Netherlands concerning the future treatment of the draft articles under consideration. With regard to article 1, he suggested that the last of the recommendations submitted by the United Kingdom in document A/CN.4/509 should be adopted. As for article 2, subparagraph (a), his preference was for the wording formulated the previous year, which had shown more clearly that a continuous scale of risks was at issue.

38. With regard to article 3, his delegation considered that the addition of the words "at any event" was not sufficient to negate what seemed to be an alternative to compliance with the obligation to prevent harm or minimize the risk of such harm. It would be easy to resolve the problem by replacing the words "at any event" by the words "where prevention is not

possible". The same amendment would have to be made in the first sentence of article 9, paragraph 1.

39. Article 9 might apply in two instances, one of which arose when a State of origin spontaneously provided another State with notification in accordance with article 8, paragraph 1. In that event, the notified State was recognized by the State of origin as being a "State likely to be affected" within the meaning of article 2, subparagraph (e). In order for the article to apply in the second case, it was essential that, if a State of origin had failed to notify the other State, the latter State, fearing that the activity in question might involve a risk of causing significant transboundary harm to it, should present the State of origin with a request in accordance with article 11, paragraph 1. If the State of origin acceded to the wish of the requesting State, it would have to apply article 8 and, from then on, the situation would be that of the first case. The second case arose if the State of origin did not recognize the requesting State as a State likely to be affected. That meant that if the State of origin did not succeed in convincing the other State that that conclusion was valid, the consultations into which the two States should enter in pursuance of article 9 would not be entirely consonant with the provisions of that article because, first, article 9 stated that the consultations should take place between the "States concerned" a term, which according to article 2 (f) signified "the State of origin and the State likely to be affected" and, secondly, it was doubtful whether, for the purposes of interpreting and applying the draft articles, it would be appropriate to regard the requesting State as the State likely to be affected, given that, unlike the situation in the first case in which article 9 applied, the State of origin did not acknowledge that the other State could be affected.

40. Consequently, the State of origin could contend, both during and after consultations, that, until it had granted such recognition, it was not obliged to apply articles 12 to 17, each of which referred either to the "States concerned" or to the "State likely to be affected". Furthermore, the State of origin could hold that, since it did not recognize the other State as a State likely to be affected, it was not bound to comply with the provisions of article 9, paragraph 3, in respect of the interests of that State, which interests did not exist for the State of origin insofar as it had not acknowledged that the other State was likely to be affected. Admittedly, in order to avoid disputes arising from claims of this type on the part of the State of origin, it might be appropriate for the draft articles to provide that a request made in pursuance of article 11, paragraph 1, would oblige the planning State to recognize the requesting State as a State likely to be affected. That would, however, be unreasonable, because it would give one State precedence over another. The only way out was to adopt the opposite solution, in other words to include in the draft articles a provision to the effect that the making of such a request did not oblige the planning State to recognize the requesting State as a State likely to be affected. If that solution was chosen, a dispute between the two States as to whether the requesting State should be regarded as a State likely to be affected, unless it could be resolved through the consultations referred to in article 9, or in subsequent negotiations, would have to be settled in accordance with article 19. That was very important because, if such a dispute was not resolved, the application of the articles would remain in abeyance.

41. The Fact-finding Commission mentioned in article 19 should also have conciliation powers, since a dispute might not turn solely on facts. Furthermore, as article 19, paragraph 6, allowed the Commission to make "recommendations", something that went beyond the powers of a merely investigative organ, and as fact-finding commissions were entitled to carry out investigations, his delegation considered that the commission was in fact a conciliation commission. In article 19, paragraphs 2 and 3, the words "and conciliation" should therefore be added immediately after the word "fact-finding".

42. Lastly, Guatemala supported the recommendation made by Sweden on behalf of the Scandinavian countries that, in article 19, more emphasis should be placed on arbitration and judicial settlement.

43. **Mr. Lobach** (Russian Federation) said that the chief merit of the draft articles on prevention lay in the fact that they developed the notion of prevention in the context of hazardous activities involving a risk of transboundary harm and established a cooperation mechanism which might pave the way to the formulation of the principles governing an equitable balance between the interests of the State carrying out hazardous activities and the interests of the States likely to be affected by them. A recommendation could be made to the General Assembly that it should elaborate the framework convention on the basis of the

draft articles on prevention. The embodying of the relevant provisions in a legally binding instrument would constitute an important step forward towards the creation of an international legal regime for the prevention of transboundary harm.

44. His delegation wished to submit some comments with a view to securing full compliance with the principles established in the draft articles. First, article 8, paragraph 2, departed from the 1991 Convention on Environmental Impact Assessment in a Transboundary Context with respect to the response to notification, by the State of origin, of the risk of significant transboundary harm. It was not clear whether, in that case, the response of the State likely to be affected had to be definitive or whether provisional notification would serve as a response. Furthermore, it was questionable whether the State likely to be affected had to agree to the carrying out of the activity or whether, at its own discretion, it could suggest to the State of origin that consultations should be held under article 9. That issue was insufficiently elucidated in the commentary.

45. As for article 9, paragraph 3, it would be advisable to define more precisely the extent to which the State of origin had to take account of the interests of the State likely to be affected, if no commonly agreed solution had been reached in consultations. In that case, the sole guide should be an equitable balance of interests.

46. Paragraph 3 of article 11 stated that during the consultations the State of origin must, if so requested by the other State, introduce appropriate and feasible measures and, where appropriate, suspend the activity in question for a reasonable period. That obligation might prove excessively onerous for the State of origin, for various reasons. In the first place, article 9, which provided for the holding of consultations at the request of any of the States concerned, did not contain any provision on the need to suspend the activity during the consultation period or any other period. Secondly, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, referred to in paragraph 6 of the commentary to article 11, provided that the State of origin could be requested to refrain from carrying out the activity (bearing in mind that it would be a planned activity, not one already in course of execution). He suggested that article 9, paragraph 3, could establish a similar regime, requesting the State of origin to refrain from carrying out the planned activity for a period not exceeding six months (as provided in article 8, paragraph 2).

47. The language of article 18 was non-traditional, in that its terms would apply only in cases where no other rules of international law existed. While the rule that the articles would not affect the obligations of States under other relevant treaties to which they were parties was appropriate, the provision that rules of customary international law took priority could reduce the scope of the article and cast doubt on the need to prepare and adopt a convention which ensured both the codification and the progressive development of the relevant area of international law.

48. Concerning article 19, he doubted whether paragraph 1 should list the peaceful means of settlement which might be chosen by the parties to settle disputes concerning the interpretation or application of the articles, given that Article 33 of the Charter of the United Nations contained a more comprehensive list.

49. **Mr. Singh** (India) expressed his satisfaction that the words "activities not prohibited by international law" had not been deleted from article 1, as those words were essential to indicate that further work remained to be done on the subject of liability following the adoption of the articles on prevention. After drawing attention to paragraphs (10), (13) and (15) of the commentary on article 3, he proceeded to a general review of various articles of the draft. Article 19 was a compromise proposal between those seeking a compulsory dispute settlement mechanism, and those who objected to any reference to a compulsory procedure, including a compulsory fact-finding mechanism. The commentaries to the draft articles explained their scope of application and provided guidance to the relevant case law and to general principles of international law, including environmental law. Reliance on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses provided for the continuity and stability of the legal principles involved. The preamble to the draft articles attempted to strike a balance between the development needs of States and the obligation to preserve and promote environmental security, bearing in mind the principle of permanent sovereignty of States over their natural resources and the Rio Declaration on Environment and Development. It also emphasized that the freedom of States to authorize the carrying out of hazardous activities within their

territories was not unlimited, and it required that interested States should be able to resort to international cooperation. The work of the Commission in that respect contributed to the progressive development of international law, particularly with regard to the obligations relating to the management of risk and engagement between States of origin and States likely to be affected. Articles 13, 15 and 19 were examples of such progressive development.

50. His delegation, along with a number of others, had emphasized the need to pay due attention to issues relating to development and the transfer of technology and resources, with a view to capacity-building in the developing countries. It had also pointed to the importance of differentiating between developing and developed countries in the application of standards and to the need to establish international funds. The draft articles were satisfactory, but the initiatives for managing risk from hazardous activities which were indispensable for development should be placed in the overall context of the right to development, with due regard for the environment and the interests of States and peoples likely to be affected. His delegation appreciated the efforts of the Commission to accommodate in the preamble its opinion that the subject of prevention could only be seen in the broader context of the right to development and the obligation to preserve the environment. The principles of "precaution" and "polluter pays" which, according to article 10, had to be taken into account when authorizing any hazardous activity, should be adopted in the interest of States and their populations and should not be invoked as strict legal obligations. In that connection, the States concerned would be guided by their economic policies and priorities, the funds made available by the operator and the overall benefits which they wished to maximize. Lastly, his delegation supported the Commission's recommendation that the draft articles should be adopted as a framework convention, and it proposed that the same procedure should be followed as for the draft articles on non-navigational uses of international watercourses.

51. **Mr. Bocalandro** (Argentina) said that the draft articles adequately covered the general norms of international law concerning the prevention of the risk of significant transboundary harm from hazardous activities. The Commission had adopted a balanced approach, taking into account both the interests of the States in which those activities originated and the interests of the States likely to be affected. His delegation therefore supported the draft articles, which could serve as the basis for a future convention of codification and progressive development in that area. The formulation of norms on liability remained pending, and the Commission should take up that important aspect, starting by clarifying the variety of terms and concepts. It was clear that, insofar as a State was bound by the obligations of prevention laid down in the draft articles, non-fulfilment of such obligations would trigger its international responsibility. In that case, the general norms on responsibility for internationally wrongful acts would apply. However, when, despite the fulfilment of all the obligations of prevention, significant transboundary harm occurred and, a fortiori, when those obligations were not fulfilled and harm occurred, it would be necessary to determine what liability would arise for the State of origin for the harm caused in the territory and other places under the jurisdiction of other States, and to what extent, in such circumstances, the State of origin should contribute to the cessation of the harm, and restitution and compensation for the damage, the amount of which, particularly in the case of environmental damage, could be substantial. It was also desirable to continue to develop general norms to regulate the liability of operators of hazardous activities in the State of origin when those activities actually caused significant transboundary harm to persons, property and the environment of other States. In that respect, it was important to bear in mind the polluter-pays principle.

52. The General Assembly, in resolution 55/152, had requested the Commission to resume consideration of the liability aspects of the topic as soon as the second reading of the draft articles had been completed, taking into account developments in international law and the comments by Governments. In that respect, Argentina wished to know how the Commission intended to approach the second stage in order to complete the study of the topic. Since the question of liability was extremely complex and significant differences of opinion had emerged, it was important for the General Assembly to receive whatever advice and proposals the Commission deemed appropriate. In that way, it would be able to decide on the best way of embodying the resultant norms in a binding instrument, namely, a convention; his delegation was prepared to contribute to negotiations in that respect.

53. **Mr. Jacovides** (Cyprus) said that article 19 provided a basic rule for the settlement of disputes concerning the interpretation or application of the regime of prevention, inspired by the provisions of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses. His delegation was pleased that paragraph 6 indicated that the parties to a dispute should consider "in good faith" the report of the findings and recommendations of the fact-finding commission. While it was necessary to find a balance, his delegation fully agreed with the view expressed by the representative of Sweden on behalf of the Nordic countries and supported in varying degrees by other delegations that the dispute settlement provisions should be strengthened by giving a bigger role to arbitration and judicial settlement. That would be more in line with his delegation's position of principle in favour of the inclusion of third party dispute settlement provisions in all multilateral conventions concluded under the auspices of the United Nations.

54. **Mr. Aurescu** (Romania) said that the topic of State responsibility was of the highest importance; the draft articles represented a compromise between the different views and interests of States, and reflected customary international law. An example of that compromise was the replacement of the notion of "international crimes" by the concept of "serious breaches of obligations under peremptory norms of general international law", although the concept of peremptory norms would have to be carefully analysed in the future. With regard to the controversial issue of countermeasures, the Commission was trying to ensure a fair balance between the legitimate interest of a State to defend its rights and the interest of the responsible State to be protected against abuse of those measures. One of the Commission's significant achievements had been to establish certain limitations on recourse to countermeasures, especially by prohibiting the use of force and limiting their purpose to inducing the wrongdoing State to comply with its obligations to cease the act and to make full reparation for the injury caused, thereby excluding any punitive purpose.

55. With regard to the form of the draft articles, Romania fully supported the Commission's recommendation that the General Assembly should take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and annex them to the resolution, and consider at a later stage the possibility of convening an international conference of plenipotentiaries to examine the draft articles with a view to concluding a convention on the topic. The formulation of the draft articles constituted a compromise between a binding legal instrument in the form of a multilateral convention and a non-binding solution, and would allow States to study the draft articles in depth and test their adequacy in practice. As to the future form of the draft articles, they should include provisions on the settlement of disputes only in the event that a convention was adopted.

56. The issue of international liability for injurious consequences arising out of acts not prohibited by international law was of increasing relevance in the area of the environment, and hence, the draft articles could be characterized as progressive development rather than codification. He was pleased that the Commission had attributed greater significance to the concept of prevention. On the question of reservations to treaties, the concept of conditional interpretative declarations as defined in draft guideline 1.2.1 deserved further consideration by the Commission, on the understanding that if the effects of such declarations were identical to those of reservations, the guidelines relating to reservations should apply mutatis mutandis to conditional declarations, as suggested in paragraph 123 of the report. With regard to late reservations, according to guidelines 2.3.1 and 2.3.2, the formulation by a State or an international organization of a reservation to a treaty after having expressed consent to be bound by that treaty should be possible if none of the other contracting parties objected to it within a period of 12 months. That idea raised no problem in principle, but the guideline might encourage States to make use of it, thereby exerting a destabilizing effect on the regime established by the Vienna Convention with regard to reservations.

57. On the topic of diplomatic protection, two questions stood out. First, the rule of continuous nationality or citizenship, if nationality was understood in its civic sense, was based on practice as well as doctrine. There were cases where the change of citizenship was caused, for instance, by marriage, adoption or succession of States, and was therefore involuntary. Second, the text on exhaustion of local remedies should include a reference to available "and effective" local remedies. Lastly, in order to make progress in dealing with issues related to unilateral acts of States, the Commission should base its work on the

practice of States and international organizations. Because of their peculiarities, unilateral acts of States should be made subject to certain clear conditions in order to produce legal effects. For example, unilateral acts in the form of domestic laws of a State should not address their effects to foreign citizens in the territory of another State, thereby creating extraterritorial consequences and seeking to establish a quasi-legal relationship between one State and the citizens of another.

58. **Mr. Lindenmann** (Observer for Switzerland) said that his Government attached special importance to the concept of "equitable balance of interests", as set forth in draft articles 9 and 10. As far as future work was concerned, his delegation had always been in favour of proceeding in stages, since prevention was only one aspect of international liability for injurious consequences arising out of acts not prohibited by international law. In that regard, he welcomed the adoption of resolution 55/152, in which the General Assembly requested the Commission to resume consideration of the liability aspects of the topic as soon as the second reading of the draft articles on the prevention of transboundary damage from hazardous activities was completed, bearing in mind the interrelationship between the prevention and the liability aspects of the topic and taking into account developments in international law and comments by Governments.

59. In its future work, the Commission should address the obligation of States to include in their domestic legislation a civil liability regime whereby the author of the harm would be required to take remedial action and make reparation under the "polluter-pays" principle. States should also be required to allow anyone who might suffer harm from hazardous activities to have access to the courts. For the time being, his delegation would not rule out the establishment of a regime providing for residual liability of the State in whose territory hazardous activities were carried out. The time had come to resume the work on liability and reparation with a view to drawing up an instrument that would deal in a comprehensive and exhaustive manner with all aspects of international liability for injurious consequences arising out of acts not prohibited by international law.

60. **Mr. Rao** (Special Rapporteur), referring to the comments made on the scope of the draft articles and the view of some delegations that he should have covered areas outside national jurisdiction, said that some of the issues omitted were equally important, but because of their particular characteristics, they needed to be considered separately in greater depth.

61. The precautionary principle and other principles were also important and certainly had a place in the draft; however, they could not be elaborated in greater detail because there was insufficient legal certainty concerning their content and scope in State practice. There was no question that those principles should be taken into account in connection with the question of authorization, but it had seemed advisable to leave it to States to exercise discretion in considering and coordinating their application.

62. On the question of dispute settlement, some delegations had commented that arbitration and judicial settlement should be given a greater role. Careful consideration must be given to the matter, on which a delicate balance was needed. The Commission had confined itself to the recent consensus on the non-navigational uses of international watercourses. If there was enough interest, the question could be taken up again when the time came to adopt the articles. If they were to be considered in a context other than that of a convention, the rules for dispute settlement could not be elaborated any further, given their limited scope. The parties would therefore have to reach consensus or agreement in each specific context.

63. With regard to the possibility of examining the question of liability at a later date, the Commission would, as usual, comply with the wishes of the General Assembly and the mandate given it by the Sixth Committee.

The meeting rose at 12.25 p.m.

United Nations A/C.6/56/SR.19

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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61972 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Kabatsi** (Chairman, International Law Commission), introducing chapter VI of the report of the International Law Commission (A/56/10), entitled "Reservations to treaties", said that at its fifty-third session the Commission had considered the second part of the fifth report of the Special Rapporteur and had adopted 12 draft guidelines on the formulation of reservations and interpretative declarations, accompanied by commentaries. It had also considered the sixth report of the Special Rapporteur and had referred to the Drafting Committee 13 draft guidelines dealing with the matters covered in that report.

2. Draft guidelines 2.2.1, 2.2.2 and 2.2.3 related to the confirmation of reservations formulated when signing a treaty. Draft guideline 2.2.1 ("Formal confirmation of reservations formulated when signing a treaty") reproduced the exact wording of article 23, paragraph 2, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. It established the principle of the obligation to confirm a reservation formulated when signing a treaty; that obligation had become part of positive international law. The Commission had also considered the effect of State succession on the implementation of that principle, the list of cases in which a reservation formulated when signing must be confirmed and the question of "embryo reservations".

3. Draft guideline 2.2.2 ("Instances of non-requirement of confirmation of reservations formulated when signing a treaty") addressed the case of treaties not requiring any post-signing formalities in order to enter into force; it was self-evident that, if formulated when the treaty was signed, a reservation became effective immediately, without any formal confirmation being necessary.

4. Draft guideline 2.2.3 ("Reservations formulated upon signature when a treaty expressly so provides") addressed the case where the treaty itself provided expressly for the possibility of formulating reservations upon signature without the need for confirmation. Although different views had been expressed in the Commission on that guideline, the majority of the members felt that such reservations were sufficient in and of themselves, it being understood that nothing prevented reserving States from confirming them.

5. Draft guidelines 2.3.1, 2.3.2 and 2.3.3 dealt with the problem of late formulation of reservations, a particularly sensitive and difficult issue. The expression "late formulation of a reservation" was used rather than "late reservations" in order to indicate that what was meant was not a new category of reservations, but declarations which were presented as reservations although they were not formulated at the specified time.

6. Draft guideline 2.3.1 ("Late formulation of a reservation") established the principle that a reservation could not be formulated after the expression of consent to be bound; the principle followed established practice, as indicated by the many examples mentioned in the commentary, but was not absolute and applied only if the contracting States did not authorize by agreement the formulation of new reservations. It was also apparent from current practice that the other contracting parties could unanimously accept a late reservation, and that consent could be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations. However, the Commission had been cautious about sanctioning a practice which ought to remain exceptional and narrowly circumscribed, hence the requirement of unanimity, whether passive or tacit, for such an exceptional act. The Commission wished to receive comments from Governments on that draft guideline and on the more specific issues raised in paragraphs 23 and 24 of the report.

7. Draft guideline 2.3.2 ("Acceptance of late formulation of a reservation") was in line with the practice followed by the Secretary-General, as recently modified, despite some concerns that a 12-month time limit might prolong uncertainty as to the fate of a reservation that had been formulated. At the same time, the wording of the draft guideline did not call into question the practice followed by other depositaries.

8. Draft guideline 2.3.3 ("Objection to late formulation of a reservation") addressed the consequences of an objection made to the late formulation of a reservation, and followed from draft guideline 2.3.1. It ensured that conventional relations would remain unaffected by the late formulation of a reservation.

9. Draft guideline 2.3.4 ("Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations") dealt with the problem of a subsequent interpretation of a reservation made earlier or of a unilateral statement made subsequently under an optional clause; those two means of circumvention had both been used in practice, and that use had given rise to jurisprudence that was accepted as authoritative, especially in the context of the Inter-American Court of Human Rights and the European Court of Human Rights. It should be noted that the reasoning which justified the prohibitions enunciated in draft guideline 2.3.4 should be applied mutatis mutandis to other means of trying to circumvent the principle of prohibition of late reservations.

10. Draft guideline 2.4.3 ("Time at which an interpretative declaration may be formulated") stated the general principle that an interpretative declaration could be formulated at any time. That principle would not apply if a treaty provided otherwise, in the case of a previous interpretative declaration which had been the basis of an estoppel, or in the case of conditional interpretative declarations.

11. Draft guideline 2.4.4 ("Non-requirement of confirmation of interpretative declarations made when signing a treaty") established the rule that it was not necessary to confirm simple interpretative declarations made when signing a treaty. It derived logically from draft guideline 2.4.3; however, if States or international organizations wished to confirm such declarations, they should be free to do so.

12. Draft guideline 2.4.5 ("Formal confirmation of conditional interpretative declarations formulated when signing a treaty") made an important exception to the principle set out in draft guideline 2.4.4 in the case of conditional interpretative declarations. It reflected current practice in which States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirmed their interpretation at the time of expression of their consent to be bound.

13. Draft guideline 2.4.6 ("Late formulation of an interpretative declaration") was the counterpart of draft guideline 2.3.1 and followed current practice.

14. Draft guideline 2.4.7 ("Late formulation of a conditional interpretative declaration") established a principle which derived from the very definition of a conditional interpretative declaration, which could be made only at certain times and not subsequent to the definitive expression of consent to be bound by the treaty. That consent, even tacit, was a necessary condition for the valid formulation of a conditional interpretative declaration; the conditions taken into account for draft guideline 2.3.1 would also apply.

15. The Commission would welcome comments on the three issues included in chapter III of its report, as well as additional answers to the questionnaire on the topic "Reservations to treaties", which had first been circulated to States in 1995.

16. **Mr. Al Baharna** (Bahrain) said that, while there was general agreement that the 1969 Vienna Convention on the Law of Treaties, the 1976 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations had established the law governing reservations to treaties and that there should be no departure from that law, the articles on reservations of those conventions had some lacunae. The purpose of the 12 guidelines under consideration was therefore to remedy that situation by clarifying the concepts of reservations and determining the scope of the application of the reservations regime.

17. Draft guidelines 2.2.1, 2.2.2 and 2.2.3 rested on article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions. Although the Commission had taken the view that draft guideline 2.2.2 was superfluous, since there was no reason to depart from the principle laid down in draft guideline 2.2.1, his country disagreed and considered all three draft guidelines to be necessary.

18. Draft guideline 2.3.1 laid down stringent conditions for the acceptance of late reservations. Provided that a reservation formulated late was not contrary to the 1969 and 1986 Vienna Conventions, there was no reason why such a guideline should not be accepted in order to facilitate the adherence of States to treaties. Moreover, State practice seemed to have encouraged that trend, which had also been followed by the Secretary-General of the United Nations in his capacity as depositary of the treaties in question.

19. Draft guidelines 2.3.2 and 2.3.3 were directly related to draft guideline 2.3.1 and were consistent with article 20, paragraph 5, of the 1986Vienna Convention. The two conditions for accepting a reservation that had

been formulated late meant that if the text of a treaty did not expressly prohibit that reservation, the well-established practice of the depositary would be the guiding principle.

20. It would seem that the legal opinion of the Secretary-General of the United Nations expressed on 19 June 1984 would run counter to draft guidelines 2.3.1, 2.3.2 and 2.3.3 if they were to be adopted by the General Assembly, since, according to that opinion, the contracting parties could unanimously, at any time, accept a late reservation, even if it were contrary to the specific provisions in the treaty as to when reservations might be formulated.

21. As draft guidelines 2.3.1 and 2.3.2 began with the phrase "unless the treaty provides otherwise", it appeared that if a reservation formulated late, contrary to the express provision of the treaty, were accepted unanimously by the contracting parties, the treaty concerned should be formally amended by the parties in order to harmonize its provisions with accepted practice.

22. The idea behind draft guideline 2.3.4 was to prevent States and international organizations circumventing the principle established in draft guideline 2.3.1. His country agreed with the reasoning set out in the commentary to the draft guideline, to the effect that a reservation once made should not be utilized as a basis for formulating a new reservation in the guise of an interpretation of the existing reservation. Hence that guideline specifically prohibited a contracting party from modifying the legal effect of a treaty by means other than a proper reservation, as defined in guideline 1.1.2.

23. His delegation disagreed with the view that the guideline lacked precision and exactitude; on the contrary it believed that the draft guideline complemented and balanced the previous three draft guidelines. Furthermore, it appreciated the fact that the Commission had confirmed the meaning of "late formulation of a reservation" in section 2.3 of the Guide to Practice. In the opinion of his delegation, the acceptance of reservations formulated late in accordance with draft guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.4 would not be contrary to the provisions on reservations of the Vienna Conventions.

24. It would seem necessary to add at the beginning of draft guideline 2.4.3 the phrase "unless the treaty provides otherwise and without prejudice to", in the light of paragraph (1) of the commentary to the draft guideline, which referred to certain exceptions to the rule in cases where the text of the treaty itself expressly provided that an interpretative declaration could be formulated only at a specified time or times.

25. The principle set forth in draft guideline 2.4.4 was broad enough to apply to all categories of treaties, irrespective of whether they were treaties made in the formal or simplified form. Since draft guidelines 2.4.3 and 2.4.4 were connected, they could be shortened and merged into one.

26. The rule in draft guideline 2.2.1 had been transposed to draft guideline 2.4.5, and it was therefore questionable whether such repetition was necessary. Similarly the rule outlined in draft guideline 2.3.1 had been transposed to draft guideline 2.4.6, and draft guideline 2.4.7 incorporated the same principle as that found in draft guideline 2.4.6. Nevertheless, his delegation did not share the view that draft guidelines 2.4.4, 2.4.5 and 2.4.6 relating to interpretative declarations and conditional interpretative declarations, which appeared to create a separate legal category, were unnecessary and therefore unacceptable, because the purpose of the draft guidelines was to fill the gaps in the Vienna Conventions without modifying their provisions concerning reservations, while at the same time clarifying State practice.

27. On the whole the 12 draft guidelines did not conflict with the provisions of the Vienna Conventions, and Bahrain therefore supported them.

28. **Mr. Guan** Jian (China), having welcomed the progress made on the topic of reservations to treaties, said that, as conditional interpretative declarations differed from simple interpretative declarations, they limited or modified the effects of treaty articles on a particular State party and therefore played a role in reservations to treaties. For that reason, it was a good idea for the draft Guide to Practice to draw a distinction between those two kinds of interpretative declarations, without laying down separate rules for conditional interpretative declarations, and to make them subject to the same legal regime as reservations.

29. In order to maintain the stability and predictability of treaty relations, a State should usually express its reservations to certain articles of a treaty before it agreed to be bound by that treaty. In specific circumstances, however, a State might be allowed to formulate reservations after it had accepted the binding

force of a treaty. Consequently, the Guide to Practice should regulate the late formulation of reservations with a view to clarifying the conditions for that practice and the procedure to be followed. The content of the relevant draft guidelines was acceptable from that point of view.

30. The depositary, as the keeper of the text of a treaty, could, in pursuance of article 77, paragraph 1 (d) and (e), of the Vienna Convention on the Law of Treaties, examine the form in which reservations were made in order to see if they were in conformity with the relevant rules of the Convention and could draw the attention of the State concerned to any anomalies. A depositary was not, however, the interpreter of the text of that treaty nor a judge of a State's compliance with it, and so a depositary should not be endowed with the right to review the legitimacy of reservations to a treaty or to refuse to transmit reservations which he deemed illegitimate. Instead, the depositary should inform other State parties of the reservations and leave the matter to their judgement.

31. **Mr. Leanza** (Italy), referring to Chapter V of the report, which dealt with international liability for injurious consequences arising out of acts not prohibited by international law, said that, on the whole, the text concentrated on risk management and due diligence in preventing harm. It highlighted States' obligations to consult one another about potential risks of transboundary harm, but did not give any State the right to veto the dangerous activities of another State in its own territory.

32. The approach adopted in the preamble seemed appropriate, but the absence of an explicit reference to the principle of precaution was regrettable, even if mention were made of the Rio Declaration on Environment and Development.

33. As for article 1, it was hard to see why the fact that an activity was unlawful for reasons other than its transboundary consequences should exempt a State from meeting its obligations in respect of transboundary harm. Limiting the scope of the draft articles to activities that were not prohibited did not seem to be entirely consonant with draft article 3 taken with Principle 21 of the Declaration of Stockholm of 1972 and with Principle 2 of the Rio Declaration.

34. Draft article 4, which had been partly reformulated to reflect the primacy of the principle of prevention set forth in article 3, was in conformity with Principle 24 of the Declaration of Stockholm and Principle 7 of the Rio Declaration and was therefore important.

35. The provision in article 4 that the States concerned should seek the assistance of the competent international organizations appeared to be significant. Nevertheless, the phrase "as necessary" left open a number of situations in which a State was not required to seek such assistance, for example, where it possessed sufficiently advanced technology, or where the treaty establishing the international organization concerned did not permit it to provide assistance in such cases. On the other hand, the formula used made it possible, as his delegation had hoped, to extend the scope of the provision to non-governmental organizations capable of offering appropriate cooperation with a view to preventing and minimizing the risk of transboundary harm.

36. His delegation had concerns about the fact that the rules of procedure provided for in the draft articles imposed certain obligations only after an environmental impact assessment had been undertaken. The fact that the assessment was to be undertaken by the very State in whose territory the hazardous activity was being carried out could limit the scope of the obligations set out in the draft articles, as it was reasonable to assume that the State concerned would have an interest in underestimating the potential risk of the activity in question. His delegation therefore reiterated the critical view which it had expressed the year before with regard to articles 7 and 8.

37. Among the articles that had been improved was article 11, which defined the procedure to be followed in the absence of notification by the State of origin concerning a risk of transboundary harm.

38. Another important innovation introduced by the Commission concerned the changes made to article 12, which clarified the relationship between the information to be exchanged between the States concerned and the activity actually carried out. The changes were designed to ensure that the requisite exchange of information took place not only during the period in which an activity involving risk was carried out, but also after the activity had ceased. That provision was important in situations where a manifestation of harm might occur only after an activity had been carried out, as in the case of activities involving the use of nuclear energy, which could

produce radioactive waste that was extremely harmful to the environment.

39. With regard to the form that the draft articles might take, he reaffirmed the views expressed by his delegation in the previous year, namely, that the Commission could not be regarded as having completed its task until it had dealt with the legal regime of consequences arising from transboundary harm. Nevertheless, the draft articles appeared to represent, a significant development in the field of risk management. For that reason, his delegation did not object to the Commission's recommendation that a convention should be elaborated on the basis of what might be considered the preliminary result of the work done in that area.

40. With regard to chapter VI of the report and the issue of so-called "late" reservations, while the Vienna Convention on the Law of Treaties always referred to reservations as unilateral declarations which could be formulated at the moment when the obligation arose, he believed it was entirely appropriate to raise questions about the late formulation of reservations, since practice existed in that area and the draft articles were intended to complement such practice. The attention devoted to the issue was not necessarily an encouragement of that practice, but rather an effort to clarify its relationship to the Vienna Conventions.

41. The real nature of such declarations was made clear by the definition in the draft guidelines of the procedure for the late formulation of reservations. The possibility of formulating late reservations was limited, in the absence of explicit authorization in the treaty, to cases in which there was unanimous consent on the part of all the other contracting parties, expressed as a lack of objections. The procedure envisaged the formation of a new tacit agreement among all the contracting parties to accept the "late" reservation without compromising the integrity of the principle *pacta sunt servanda*.

42. It might therefore be concluded that the procedure to be followed in respect of the late formulation of reservations, as adopted by the Commission, did not differ on essential points from the provisions of the Vienna Convention on the Law of Treaties. The late formulation of reservations was, of course, a complicating factor in treaty relations, and should be limited as far as possible. States should therefore ensure that the practice of formulating late reservations remained limited to cases in which the formulation represented a reasonable alternative to practice of denunciation of the treaty, followed b new ratification accompanied by a new reservation.

43. **Mr. Choung Il Chee** (Republic of Kor referring to chapter III of the report, drew attentio paragraph 169. In that paragraph the Spe Rapporteur dealt with a criticism made of traditional rule of continuous nationality, namely, the rule could lead to the denial of diplom protection to individuals who had changed nation involuntarily, whether as a result of succession St or for other reasons, such as marriage or adoption. Special Rapporteur recommended that the Commis should adopt a more flexible rule, giving gre recognition to the individual as the ultimate benefic of diplomatic protection. His delegation welcomed approach and suggested that article 9, paragraph should be deleted from the draft articles.

44. He drew attention in that regard to article 9 of Convention on the Elimination of All Forms Discrimination against Women, which required St parties to grant women equal rights with men acquire, change or retain their nationality and to en that neither marriage to an alien nor change nationality by the husband during marriage wi automatically change the nationality of the wife.

45. Paragraph 28 (a) of the report appeared to re to the 1970 rulings by the International Court of Jus in the *Barcelona Traction* case. The Court majority ruled that where it was a question of an unsuccess act committed against shareholders of a comp representing foreign capital, the general rule international law authorized the national State of company alone to make claim, thus denying diplom protection to the shareholders of the comp Nevertheless, that ruling had been criticized by var writers as unfair to the shareholders. His delega believed that if damages and injuries were sustained a shareholder, the State of which the shareholder w national should be able to exercise diplom protection on its behalf.

46. With regard to paragraph 28 (b), the issue foreign shareholders bringing a claim against their company appeared to fall within the purview of internal law of States, except where there was a de of justice or discrimination against aliens.

47. With regard to chapter IV of the report, it was proposed that the previous references to serious breach of an obligation owed to the international community as a whole should be replaced with the category of peremptory norms; his delegation endorsed that view and the rationale provided.

48. With regard to countermeasures, it would have been helpful to provide a definition of countermeasures in article 49. Such terms as "non-use of force" and "legitimate act under international law" could have added clarity and certainty to the concept of countermeasures. The regime of countermeasures which had been known in the past as retaliation had now surfaced as a legitimate regime under international law since the Court's judgement in the *Gabčíkovo-Nagymaros* case and, as such, was a relatively new regime. Practitioners and scholars in the field of international law could benefit from a clear and settled doctrine.

49. With regard to the conditions relating to resort to countermeasures set forth in article 52, he said that paragraph 1 (a) of that article imposed an unfair burden on the injured State by requiring it to call on the responsible State to fulfil its obligations before taking countermeasures. Paragraph 1 (b) imposed further burdens on the injured State by requiring it to notify the responsible State of any decision to take countermeasures and to offer to negotiate with that State.

50. With regard to the form of the draft articles, his delegation was in favour of a binding convention, as it believed that 50 years of work by the Commission should not be taken lightly. Nevertheless, in order to accommodate the divergent views expressed, his delegation was inclined to support the Commission's recommendation that the draft articles should be annexed to a resolution of the General Assembly, and that an international conference of plenipotentiaries should be convened at a later stage.

51. With regard to chapter VIII of the report, the draft article included a classification of unilateral acts, namely, promises, waivers, recognitions, protests, and so on. Nevertheless, it omitted unilateral declarations and the conduct of States, an omission which might not be warranted. He could cite two unilateral declarations which had evolved into norm-creating precedents, namely, the two Truman Proclamations of 1945 on conservation and on the continental shelf.

52. With regard to the conduct of States which might produce legal effects, his delegation was familiar with two relevant decisions by the International Court of Justice, namely, the *King of Spain* case of 1960 and the *Temple of Preah Vihear* case of 1962. In those two cases the Court had established a rule that States were bound by the consequences of their conduct. For that reason, his delegation believed that the conduct of States deserved independent scrutiny apart from unilateral acts.

53. With regard to the Special Rapporteur's statement that the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties could constitute a valid reference in the elaboration of rules for the interpretation of unilateral acts, his delegation noted that while the Vienna Conventions were based on a treaty which was consensual in character, unilateral acts were purely unilateral; that difference should be kept in mind.

The meeting rose at 4.35 p.m.

United Nations A/C.6/56/SR.20

General Assembly

Fifty-sixth session

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Sixth Committee

Summary record of the 20th meeting

Held at Headquarters, New York, on Tuesday, 6 November 2001, at 10 a.m.

Chairman Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-61692 (E)

The meeting was called to order at 10.15 a.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Fomba** (Mali) said that the mechanism for the formulation of reservations offered an opportunity for broad consensual participation by States in the development of international law. The Guide to Practice on reservations to treaties proposed by the International Law Commission would be useful, especially for small States. The distinction between conditional and "simple" interpretative declarations was helpful. With regard to the possibility of not including in the draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations, his delegation felt that if it was confirmed that such declarations were subject, mutatis mutandis, to the same legal regime as reservations, it would be necessary to continue looking at actual practice in order to corroborate that conclusion, and to that end States and international organizations must provide more specific information as promptly as possible. If, however, the hypothesis was confirmed, his delegation would concur that specific guidelines need not be included, although some problems might remain, such as how to distinguish between reservations and interpretative declarations.

2. With regard to the late formulation of reservations, States must be allowed some flexibility in order to ensure the broadest possible participation in treaties, but freedom in that regard should not be unlimited or unconditional, and that question had therefore been dealt with in the 1969 Vienna Convention on the Law of Treaties. What the Commission was suggesting was an exceptional practice, which departed from the provisions of the Vienna Convention by taking into account the practice followed by depositaries and in particular by the Secretary-General of the United Nations. Since that approach might encourage States to abuse the practice, it would be advisable to limit the scope *ratione temporis* of the right to formulate reservations to that of the process of exhausting the means of expressing consent. The Commission's suggestion that reservations formulated late should be admitted if the treaty did not provide otherwise and there were no objections to their formulation would eliminate the risk of abuse. However, the use of the term "objection" to signify opposition to the late formulation rather than to the content of the reservation, while useful in harmonizing terminology, might lead to confusion. He proposed that the word "objection" should be replaced by the terms "objection to the right to formulate a late reservation", "denial" of that right or "opposition" to that right.

3. With regard to the functions of depositaries, his delegation was not opposed to reproducing in the guide to practice the provisions of articles 77 and 78 of the 1969 Vienna Convention and adapting them to the particular case of reservations. However, the problem arose of whether it lay with the depositary to refuse to communicate to the States concerned a reservation that was manifestly inadmissible, particularly when it was prohibited by a provision of the treaty. Article 76, paragraph 2, of the Convention set forth the international and impartial character of the functions of the depositary; article 77, paragraph 1 (d), established the right of the depositary to examine whether a communication relating to the treaty was in due and proper form; and article 77, paragraph 2, stipulated that the depositary should bring to the attention of States any difference as to the performance of its functions. Altogether, it was clear that the aim was not to confer full powers on the depositary in that regard. Article 19 of the Convention denied a State the right to formulate a reservation when it was prohibited by the treaty, was not included among those that could be made in accordance with the provisions of the treaty or was incompatible with the object and purpose of the treaty. Thus, to confer on the depositary the power to refuse to communicate a manifestly inadmissible reservation would appear to be a logical consequence of the application of article 19. In any event, it would be useful for the formal validity of the reservation to be examined, before or after communication, although an examination ex ante clearly had practical advantages.

Mr. Florent (France) reiterated his view that, in the French version, the term "*directive*" was not appropriate, and should be replaced by "*ligne directrice*". Draft guideline 2.1.1, on the written form of reservations, reflected the rule in article 23 of the 1969 Vienna Convention on the Law of Treaties. It raised no problems, but what the Special Rapporteur called "oral reservations" could not exist, since for both the expression of consent and the reservations themselves, the written form was the only means of guaranteeing stability and security in contractual

relations. Draft guideline 2.4.2 (Formulation of conditional interpretative declarations) was acceptable, but the procedure could be simplified by making it clear that the "guidelines" in relation to reservations would apply, mutatis mutandis, to conditional interpretative declarations. However, the longer version of draft guideline 2.1.3 (Competence to formulate a reservation at the international level), which reproduced article 7 of the Vienna Convention, did raise some difficulties, and the same was true of draft guideline 2.4.1, on the formulation of interpretative declarations. The word "competence" might give rise to confusion, and it was necessary to draw a distinction between the authorities competent to "make" or "formulate" a reservation and those competent to "express" or "present" the reservation at the international level. The latter question was not so much one of competence as of representative capacity; for example, the head of a permanent mission to an international organization might be considered competent to formulate a reservation on behalf of the State which he represented, without having to produce full powers when communicating the text of the reservation.

Draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations) was based on article 46 of the Vienna Convention, and it should perhaps be admitted, as the article did, that if the violation was clear-cut and affected a rule of fundamental importance in the internal law of a State, that State might argue that the reservation was defective. However, since the State could always withdraw the reservation, the rule would be of little practical interest. Draft guideline 2.1.5, on the communication of reservations, supplemented article 23 of the Vienna Convention by referring to reservations to constituent instruments of international organizations. The wording proposed by the Special Rapporteur was acceptable on the whole, but he would like to know what exactly was meant in the second paragraph by "a deliberative organ that has the capacity to accept a reservation". The same was true of draft guideline 2.4.9, on the communication of conditional interpretative declarations. France also took the view that neither reservations nor interpretative declarations could be made by electronic mail, which was not an appropriate medium and did not offer any guarantees of security.

Draft guidelines 2.1.6 and 2.1.7, which dealt with the functions of depositaries of treaties, did not present any difficulties and emphasized the purely "administrative" role of the depositary. However, it would be interesting to contemplate the possibility that the depositary might reject a prohibited reservation, in accordance with article 19 (a) and (b) of the Vienna Convention. It would be important to know whether that prerogative could be conferred on the depositary, or whether it would be necessary to abide by the provision in article 77, paragraph 2, of the Vienna Convention, which stated that, in the event of any discrepancy appearing between the State presenting a reservation and the depositary as to the performance of the latter's functions, the depositary must bring the question to the attention of the other signatory and contracting States. The whole question should be studied in greater depth, since current practice appeared to show that depositaries were rejecting reservations prohibited by the treaty itself. Lastly, according to draft guideline 2.1.8 (Effective date of communications relating to reservations), a communication relating to a reservation would only be considered as having been made by the State which was the author of the reservation "upon its receipt by the State or organization to which it was transmitted". That proposal was similar to the provision in article 78, subparagraph (b) of the Vienna Convention, and was quite acceptable.

Ms. Wyrozumska (Poland) said that since exactly the same legal regime was proposed for reservations and for conditional interpretative declarations, there was no need to draw a distinction, especially as guideline 1.3 made it clear that "the character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce". For that reason, the Guide to Practice should not perhaps include draft guidelines specifically relating to conditional interpretative declarations, since such declarations were rightly included within the concept of reservations.

As to the question of late formulation of reservations, her delegation took the view that the practice should be exceptional and remain subject to strict conditions, and was in favour of the negative formula used in guideline 2.3.1. A period of 12 months following the date on which notification of the reservation was received was a reasonable time limit

for the tacit acceptance of late formulation of reservations, and to require express unanimous consent would rob of any substance the rule that late reservations could be made under certain conditions. Poland supported the formula proposed by the Commission in guidelines 2.3.2 and 2.3.3 concerning acceptance of or objection to the late formulation of a reservation, and not to a reservation itself. However, the distinction might create doubts as to the legal effects of acceptance. It could be presumed from guideline 2.3.3 that acceptance of the late formulation of a reservation signified acceptance of the reservation itself.

With regard to the functions of the depositary of a treaty, Poland shared the view that it was no part of the depositary's function to assume the role of an interpreter or to judge the nature of the reservation made by one of the parties. However, on receiving a reservation which was manifestly inadmissible, the depositary could draw the attention of the reserving State to that fact, or could refuse to circulate a communication if the reservation was expressly prohibited by the treaty. In those circumstances, if the reserving State did not withdraw it, or insisted on its being circulated, the depositary could not refuse to communicate it to the States and international organizations concerned, or to draw it to their attention. That practice seemed to be in line with the Vienna Convention, and specifically with article 77, paragraph 2. In any case, if the reservation was expressly prohibited by the treaty or was manifestly inadmissible under it, article 20, paragraph 5, of the Vienna Convention would not apply, so the lapse of 12 months would not make the reservation effective.

Mr. Lavalle-Valdés (Guatemala) said that every instance in which a guideline reproduced the text of a relevant provision of a Vienna Convention should be indicated in a footnote, as was done when the rules of procedure of the General Assembly reproduced a provision of the Charter of the United Nations.

Guideline 1.4.7 should be expanded to include cases in which a treaty, rather than requiring the parties to choose between two or more provisions of the treaty, merely allowed them to make such a choice. Guideline 2.2.2 would be improved if the words "in accordance with the relevant provisions of the treaty" were added between commas after "by its signature". There appeared to be an inconsistency between the title of guideline 2.2.3 and its content, which referred not to reservations formulated when a treaty expressly so provided, but rather to cases where the treaty "expressly provides that a State or an international organization may make such a reservation" when signing the instrument. The two situations were not the same. In order to harmonize the title and the text of the guideline, the latter should state: "Where the treaty expressly provides that a State or an international organization may make certain reservations when signing the treaty, a reservation made at that time does not require ...".

Guideline 2.3.2 should expressly permit any State or international organization which became a party to a treaty prior to the expiry of the 12-month period to formulate an objection to a reservation prior to the said expiry. Guideline 2.3.3 was unnecessary since guideline 2.3.1 stated that if even one State or international organization which was a party to the treaty objected to the late formulation of a reservation, the latter would not take effect. The situation existing between any party which had objected to the formulation of the reservation and the party which had formulated it was the same as that which would exist between any other party to the treaty and the party which had formulated the reservation.

Guideline 2.3.4 (a) was problematic since if a reservation to a treaty was valid and entered into force, it became part of the regime established by the treaty. Consequently, in accordance with guidelines 1.2 and 2.4.3, both the party to the treaty which had formulated the reservation and any other party thereto should be able to formulate a simple interpretative declaration concerning the reservation at any time unless to do so was prohibited by the treaty. The current text of paragraph (a) should therefore be replaced by: "A statement which appears to be a simple interpretative declaration concerning a reservation but which purports to exclude or modify the legal effect of the treaty". Furthermore, paragraph (b) of guideline 2.3.4 was not easily understood; a reader without the help of the commentary would have the impression that the paragraph referred to statements by which a State or an international organization merely availed itself of the optional clause in question. For example, in the case of an opting-in clause, a statement through which the State merely elected to opt in might be assumed to fall within the scope of paragraph (b), which was impossible. For those reasons, and on the basis of the statement made at the end of paragraph 5 of the

commentary on guideline 2.3.4, his delegation proposed that the text of paragraph (b) should be replaced by: "A unilateral statement made subsequently under an optional clause and accompanied by conditions or limitations with effects identical to those of a reservation, except in cases where the optional clause makes a corresponding provision".

Lastly, guideline 2.4.6 could be improved by adding the words "or within specific time periods" after the word "times".

Simple interpretative declarations (as opposed to conditional interpretative declarations) also called for comment. Such declarations produced legal effects in only two cases: when they gave rise to an estoppel and when they were really reservations "in disguise". The first case clearly lay outside the scope of the guidelines; but the second did not. It should be noted, however, that in order for a simple interpretative declaration to constitute a reservation "in disguise" and, consequently, to fall within the scope of the guidelines, it must be formulated in writing. Therefore, the guidelines should deal only with simple interpretative declarations which were so formulated — in other words, which had been submitted to the depositary and which genuinely constituted, or were considered by a party to the treaty to constitute, a reservation.

The meeting rose at 10.55 a.m.

United Nations A/C.6/56/SR.21

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Summary record of the 21st meeting
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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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01-62241 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10 and Corr.1)

1. **Mr. Prandler** (Hungary), referring to the topic "Reservations to treaties", said his delegation noted with satisfaction that the Special Rapporteur and the International Law Commission continued to uphold the goal of producing a Guide to Practice relating to reservations and interpretative declarations, which would systematize the prevailing practice of States and international organizations. It agreed that reservations were useful in that they might be conducive to States becoming parties to multilateral treaties and thereby contribute to the general acceptance of international legal norms.

2. His delegation welcomed the adoption of the 12 draft guidelines, and agreed that they should cover international organizations, as well as States; that approach reflected the increasing role played by international organizations in law-making, a trend which should be encouraged.

3. His delegation could accept the content of most of the draft guidelines and the commentary thereto. It supported a regime through which the integrity of treaties and the principle of *pacta sunt servanda* would be upheld. It agreed that conditional interpretative declarations should be covered by the guidelines; however, they should be subject to the same legal regime as reservations. It was possible that only a single general guideline would be needed, as suggested in paragraph 123 of the report.

4. On the issue of late formulation of reservations, the guidelines reflected the developing practice of States and international organizations, including the practice followed by the Secretary-General of the United Nations. Since the issue had not been covered by the Vienna Convention on the Law of Treaties, the restricted approach taken by the Special Rapporteur was acceptable. His delegation believed that the late formulation of reservations should be permitted only as an exception to the rule and only if the States parties accepted them.

5. Hungary was the depositary of only a few multilateral treaties. His delegation shared the view that the depositary should faithfully implement its role, which was primarily administrative in nature, without making any attempt to influence or prejudge the views of the States parties concerning issues which might be raised by them.

6. His delegation supported the view that the international community could not tolerate reservations to human rights treaties if they ran counter to the major objectives and principles of the treaties in question. It would have liked more information on activities in the field of human rights treaties by the Commission on Human Rights and the Subcommission on the Promotion and Protection of Human Rights, and the interrelationship of such activities with the work of the Commission, and hoped that those issues would be covered in the next report.

7. **Ms. Dascalopoulou-Livada** (Greece) said that the Commission had made some progress on the topic "Diplomatic protection". In relation to article 9, however, her delegation felt that the approach taken by the Special Rapporteur was not the best one. Instead, the traditional rule, which had been upheld by State practice and conventional texts, should be maintained; the legitimate concerns which existed could be taken into account by providing for exceptions to the rule, in the context of progressive development. Such exceptions would come into operation in cases of involuntary change of nationality, in particular State succession, where nationality was attributed directly and ipso jure by the law, and other cases including marriage and adoption.

8. The traditional rule addressed the concern about preventing abuse on the part of individuals or States through "forum shopping" and expressed the idea that through diplomatic protection the State asserted its own rights. While that approach did not entirely conform with the interests of the individual in the context of human rights, those rights were protected in other ways and by different means, including the right of individual petition under a human rights convention, which was detached from nationality altogether. Moreover, the merging of the concepts of diplomatic protection and human rights and the loss of clarity of their delimitative dimensions was not in the interest of international law or, ultimately, of individuals.

9. Those observations referred to article 9, paragraph 1, and were also applicable to paragraph 2, on the transfer of claims, a concept which her delegation viewed with great caution. Her delegation's

approach to both paragraphs would deprive paragraph 3 of much of its relevance; however, that paragraph needed to be retained in cases where there had been an involuntary change of nationality. Paragraph 4 provided a useful reminder of the obligation to abstain from the adoption of domestic legislation which would infringe on the need for diplomatic protection.

10. Article 10 reflected a well-established rule of international law. However, paragraph 1 should be amended to include the criterion of effectiveness, which was of crucial importance and had been consistently applied under human rights conventions, including the European Convention on Human Rights. Paragraph 2 was generally satisfactory; the expression "judicial or administrative courts or authorities whether ordinary or special" was sufficiently clear to meet the needs which arose.

11. In article 11, the two tests proposed in order to determine whether local remedies had been exhausted, which should apply alternatively and not cumulatively, were adequate to cover the requirements of the article; it would be up to the judge to apply those tests or criteria. There was no need for illustrative examples in that respect.

12. No substantive progress had been made on the topic "Unilateral acts of States". Her delegation felt that the Commission should focus on acts forming an autonomous source of international law, when a unilateral act constituted a binding obligation towards another State or States or towards the international community as a whole. Although such acts were not common, they must be regulated for reasons of legal certainty. Consequently, the Commission should not consider unilateral acts which were linked with a treaty or with a rule of customary international law, or institutional acts of international organizations.

13. With regard to the interpretation of unilateral acts, her delegation was not convinced that the establishment of an almost complete parallel with articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties was appropriate, because unilateral acts differed greatly from the written agreements to which that Convention referred. The starting point should be the interpretative needs of the unilateral acts themselves, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.

14. **Mr. Dinstein** (Israel), referring to the topic "Reservations to treaties", said that his delegation was concerned about the tendency to assimilate interpretative declarations to reservations; it believed that the two categories should remain separate. A reservation was a formal step whereby a State purported to exclude or modify the legal effect of a certain treaty provision in its application to that State, whereas an interpretative declaration merely clarified the meaning or scope attributed by a State to a treaty provision. A reservation was a *conditio sine qua non* to the consent of a State to be bound by a treaty, and, if accepted by other contracting parties, it became reciprocally binding; an interpretative declaration did not normally require any action on the part of other contracting parties. There were also distinctions between a formal reservation and an interpretative declaration in terms of when and in what form they could be formulated. Another cardinal difference was that if a reservation was accepted, and was compatible with the object and purpose of a treaty, it must be considered as an integral part of the treaty in the relations between the reserving State and the accepting parties; conversely, an interpretative declaration constituted merely a clarifying device relating to the interpretation or scope of a treaty. His delegation therefore felt that interpretative declarations should not be governed by the same rules as reservations to treaties.

15. On the question of the role of the depositary of a treaty in the communication of reservations, his delegation felt that the scope of the depositary's functions should not be broadened beyond the provisions of the Vienna Convention on the Law of Treaties, and that only States and international organizations that were contracting parties to a treaty should decide whether a given statement or instrument constituted a reservation and whether such a reservation was admissible.

16. With regard to the topic "Diplomatic protection", the first two reports submitted by the Special Rapporteur raised two central issues, namely, continuous nationality and exhaustion of local remedies.

17. There was no doubt as to the norms governing continuous nationality pursuant to customary international law. There was an established case law to the effect that, as a rule, diplomatic protection could only be exercised on behalf of a national of the plaintiff

State, and that the link of nationality must exist from the first to the last moment of the international claim.

18. The Special Rapporteur's original proposal in article 9 had been to depart from customary international law in cases where the injured person had undergone a bona fide change of nationality, so as to allow the new State of nationality to exercise diplomatic protection, provided that the State of original nationality had not already done so. That idea had been justly criticized by the majority of the members of Commission, for two reasons: first, it would allow "forum shopping", in other words, it would permit the injured person to try to acquire a new nationality with a view to increasing the chances of a claim being resolved; second, it would run counter to the basic concept underlying diplomatic protection, whereby the right to lodge an international claim against the injuring State was vested in the State of nationality and not in the injured person. Since the State of nationality was deemed by customary international law to be asserting its own right to submit a claim, the injured person had always been denied the right to waive a claim or to determine how it should be handled. If the injured person was incapable of a waiver, it was unclear why he should have the legal capacity to transfer the claim with him to a new State of nationality. Nor was it clear how that new State could maintain that it had been injured itself when it had no connection to the original injury at the time when that injury had occurred.

19. His delegation was nonetheless of the view that the Commission would be well advised to consider a less far-reaching alternative mentioned by the Special Rapporteur, namely, to retain the customary rule, subject to exceptions in the case of involuntary change of nationality. Unlike a voluntary change of nationality, which raised fears of abuse, involuntary change took place through nobody's fault, and common sense as well as justice demanded that the general rule of continuous nationality should be mitigated. There were two major scenarios involved: the disappearance of the State of original nationality and the death of the individual in question. In the first instance, where the State of original nationality no longer existed, it should be legitimate for a successor State to assume the right to continue with a claim in the exercise of diplomatic protection of the individual. In the second instance, where the individual had died and his heirs were foreign nationals, the customary rule was simply illogical. Since the right of the State of original nationality crystallized at the moment of injury, he failed to understand why it should be adversely affected by the subsequent death of the injured person. Involuntary change of nationality should not diminish the right vested in the plaintiff State.

20. As for the rule of exhaustion of local remedies, it was predicated on unimpeachable customary international law. The only possible critique of article 10 was that the rule, which had evolved over a long period in case law, had numerous specific applications not expressly addressed in the text. It might be advantageous to be more explicit about such practical problems as appeals and other available means of challenging a judgement under the domestic legal system, the potentially fatal consequences of not calling certain indispensable witnesses, and the need to avail oneself of all procedural means crucial to the success of the case.

21. Article 11 related to an important issue which had first surfaced in the Israeli pleadings before the International Court of Justice in the *Aerial Incident of 27 July 1955 case*. His Government's position had always been that when faced with an injury that was both direct and indirect, it was necessary to examine the component elements and to treat the incident as a whole on the basis of the preponderant element. Should the injury to a national giving rise to diplomatic protection be the preponderant element in the claim, the exhaustion of local remedies was indispensable. Conversely, if the direct injury to a State was the preponderant element in the claim, the exhaustion of local remedies ceased to be a required condition.

22. With regard to chapter VIII of the report, it was useful to distinguish between the forms of unilateral acts of States and their effects. As far as form was concerned, it was convenient to distinguish among four modalities: (1) specific notations to specific addressees; (2) general declarations or statements issued *urbi et orbi*; (3) action unaccompanied by any statement or declaration, such as the opening of hostilities; and (4) silence amounting to acquiescence. Since the Special Rapporteur had dwelt at length on the meaning of silence, it might be added that silence had legal consequences only in situations where the State knew of a certain event or a claim by another State and nonetheless declined to say or do anything by way of a timely response. In certain circumstances, the State's decision not to take action was itself an action.

23. With regard to the effects of unilateral acts, there were many possibilities. It might suffice to list 10 variables: (1) assumption of an international legal obligation, e.g., by accepting the compulsory jurisdiction of the International Court of Justice; (2) termination of an international legal obligation, e.g., by denouncing a treaty; (3) claim of a right, e.g., by asserting a certain maritime line delineating the continental shelf; (4) waiver of a right, e.g., by allowing a foreign State to prosecute an accredited diplomatic agent; (5) exercise of a right, e.g., by declaring a foreign diplomat persona non grata; (6) creation of a new status, such as a declaration of war or neutrality; (7) termination of such status; (8) recognition of a new State or Government; (9) interpretation of the State's own position vis-à-vis its obligations and rights; and (10) protest against another State's acts.

24. Obviously, as the Commission noted, all those effects were contingent on the validity of the unilateral acts of States. Acts which were invalid pursuant to international law were null and void, producing no effects whatsoever. Another point worth mentioning was that frequently a unilateral declaration by a State was not binding per se. Still, the declaration gave rise to a state of estoppel, so that the State was subsequently precluded from acting in a manner incompatible with the declaration. The subject of estoppel deserved to be addressed before the Commission finalized its study of unilateral acts of States.

25. In his fourth report, the Special Rapporteur had highlighted the pivotal question of the interpretation of unilateral acts of States. That was the crux of the issue, especially when it was argued that a State had, through a unilateral declaration, assumed a binding obligation. The interpretation of unilateral declarations of States must be undertaken carefully and the conclusion that a State had unilaterally assumed a binding obligation was wholly contingent on an unequivocal finding that such was the intention of the State issuing the declarations. Often, it was better to read the unilateral declaration together with some complementary declarations by other States suggesting that an international agreement had been reached.

26. It was important to bear in mind that a binding unilateral declaration was even more far-reaching than a treaty. As a rule, a State could denounce a treaty, yet there was no effective way to denounce a binding unilateral declaration. For all those reasons, his delegation strongly supported the proposal by the Special Rapporteur to apply to unilateral declarations the principles of interpretation contained in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

27. **Mr. Pellet** (Special Rapporteur on reservations to treaties) expressed appreciation to the members of the Committee for having continued the practice instituted in 1997, during his chairmanship of the Commission, of inviting the special rapporteurs present in New York during the General Assembly to address the Committee in order to indicate what conclusions they drew from the debate. While that step had constituted real progress, he nonetheless felt that the results achieved were less than convincing. Whenever he participated in the Committee's debate, he found it extremely formal, to the point of being formalistic, and he wondered whether it might be possible to envisage a freer exchange of views between representatives of Governments and members of the Commission, provided that the latter clung to their role as independent experts.

28. A genuine debate would, of course, serve no purpose unless it was prospective in nature. States, almost by necessity, reacted to drafts that had already been adopted and to which the Commission would revert only on second reading, usually several years later. The only way to remedy that situation would be to undertake a thorough reform of the working methods of both the Committee and the Commission, a matter well worth considering. It would be much more useful for the Commission to have an indication of the general feeling among the members of the Committee before adopting a draft rather than afterwards.

29. Despite those criticisms, he had listened with great interest to the comments of States on the topic "Reservations to treaties". While no immediate conclusions could be drawn, the comments indicated tendencies which might have an influence on the Commission's future work on reservations. Useful suggestions had been made, although on occasion the criticisms that had been expressed concerning the draft guidelines had seemed to be based on a mistaken interpretation. Since he did not wish to monopolize the debate, he would confine himself to responding to the comments by States on the three questions raised by the Commission in paragraphs 20 to 24 of its report.

30. Governments appeared to be nearly unanimous in their view that the role of the depositary in respect of reservations should be in line with their role, pursuant to articles 77 and 78 of the Vienna Convention on the Law of Treaties. While he could not foresee what the Commission would decide in that regard, he intended, if he again found himself in the role of special rapporteur in the following year, to pursue that line of thinking in discussions on the subject.

31. With regard to conditional interpretative declarations, a clear tendency also seemed to have emerged from the discussions in the Committee. With notable exceptions, Governments seemed convinced that it was unnecessary to devote a long series of draft guidelines to the issue. That position seemed reasonable on one condition, namely, if the rules applicable to conditional interpretative declarations proved to be the same as those relating to reservations. So far that appeared to be the case, but as the effects of conditional interpretative declarations were as yet unknown, he would prefer a wait-and-see approach. It was necessary to determine that there was indeed no difference between the legal regime relating to reservations and the one relating to conditional interpretative declarations.

32. The most controversial issue remained to be addressed, namely, the late formulation of reservations. Like the members of the Commission, the representatives of Member States appeared to be fairly divided on the issue. With the exception of one delegation, which had been categorical in stating its views, no Government had questioned the fact that certain reservations were formulated late, however regrettable that might appear to some. Delegations were divided, however, as to whether it was advisable to include in the Guide to Practice one or more draft guidelines along those lines, which, according to some delegations, posed the risk of encouraging the late formulation of reservations.

33. While he was among the first to agree that such a practice must not be encouraged, he was somewhat baffled by the ostrich-like position of some delegations in refusing to admit that the practice of late formulation of reservations existed. All States, without exception, had participated in that practice, and none had ever protested against it in principle. Moreover, it was undeniable that the practice led to the formulation of reservations that all States agreed to consider as legitimate. Under those conditions, he failed to understand how delegations could question the advisability of mentioning the practice in the Guide to Practice, precisely in order to regulate it and limit its harmful effects.

34. As he had stated earlier, he was unable to draw conclusions from the debate in the Committee, because the Commission could not reopen debate in 2002 on what it had adopted in 2001. The debate highlighted the imperfections of the current mechanism of collaboration between the Committee and the Commission, a collaboration which all too often turned into a dialogue of the deaf. He deeply regretted that situation.

35. **The Chairman** expressed gratitude to the Special Rapporteur for his valuable work on the topic "Reservations to treaties".

The meeting rose at 4.15 p.m.

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Chairman: Mr. Lelong ..... (Haiti)

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Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*)

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The meeting was called to order at 3.15 p.m.

Agenda item 162: Report of the International Law Commission on the work of its fifty-third session (*continued*) (A/56/10)

1. **Mr. Kabatsi** (Chairman of the International Law Commission) introduced chapters VII, VIII and IX of the report of the International Law Commission on the work of its fifty-third session (A/56/10). With regard to chapter VII, concerning diplomatic protection, he said that the Commission had considered the addenda to the first report of the Special Rapporteur, which focused on the issue of continuous nationality and the transferability of claims. Article 9 dealt with continuous nationality. In the view of the Special Rapporteur, the traditional approach to that rule, which had come under criticism, should be replaced by a more flexible approach. As outlined in paragraph 170 of the report, the text proposed by the Special Rapporteur would allow a State to bring a claim on behalf of a person who had acquired his or her nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Safeguards would ensure against abuse.

2. The debate in the Commission had indicated some support for the Special Rapporteur's approach. At the same time, it had been noted that the Rapporteur had set himself the difficult task of challenging an established rule of customary international law. While it had been conceded that such a customary rule existed, it had also been stated that even well established rules could be changed when they no longer conformed to developments in the international community, and that it was within the Commission's mandate to propose such changes. Support had also been expressed, however, for maintaining the traditional rule, particularly since the reasons in favour of the traditional approach, such as the concern to avoid abuse on the part of individuals or States, were still applicable. Moreover, the strength of State practice and the lack of evidence of an emergent principle or new practice militated against changing the rule.

3. A key issue in the debate had been the relationship between diplomatic protection and the protection of individuals under international law. According to one view, the rule of continuous nationality had outlived its usefulness, as individual rights were clearly now recognized by international law. The view had also been expressed that the general trend in international law of protecting individuals was not sufficient justification for changing the rule on continuous nationality. At the same time, there had been agreement that the rule needed to be made more flexible so as to avoid inequitable results. Accordingly, a strong preference had been expressed for adopting a middle course, whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State. Lastly, it had been proposed that the Commission should consider some additional issues relating to the nationality of claims (A/56/10, para. 183).

4. Articles 10 and 11 concerned the rule of exhaustion of local remedies. Article 10 established the context for the subsequent articles on that rule. In the view of the Special Rapporteur, it was not always possible to maintain the distinction between primary and secondary rules throughout the draft articles on diplomatic protection. In particular, the concept of denial of justice had featured prominently in most attempts at codification of the local remedies rule and should also be considered in the current context. The Special Rapporteur had further noted that the term "legal remedies" included all judicial remedies available under the municipal system, as well as administrative remedies, where they were available as of right but not where they were discretionary or available as a matter of grace. It had also been observed that there was the matter of the claimant's requirement to exhaust the "procedural facilities" available in municipal courts, a matter raised by the *Ambatielos* case, as well as the issue of the requirement to raise before the domestic courts all the arguments that a claimant intended to raise at the international level.

5. Support had been expressed in the Commission for the Special Rapporteur's approach of dealing with the topic in several articles, instead of one lengthy article. It had been noted that the exhaustion of local remedies rule was a well established rule of customary international law. It had, however, been suggested that the article should be reformulated as a synthetic definition of the rule to be followed by more specific provisions. At the same time it had been observed that

there was a limit to which specificity should be required, since the application of the local remedies rule was highly contextual. Different views had also been expressed in the Commission regarding adherence to the strict distinction between primary and secondary rules. One view had supported the inclusion of the concept of denial of justice. Another view had considered that there was no need to introduce a provision on denial of justice, since it was an example, among others, of cases in which local remedies were not "effective".

6. Other comments on the article had included the concern that without the addition of the qualifier "effective", the reference to "all" available local remedies would be too broad and would impose an excessive burden on the injured person. As to the definition of "local legal remedies", it had been suggested that the purpose of the remedies to be exhausted should be stated, and that the term "legal" could include all legal institutions from which the individual had a right to expect a decision, a judgement or an administrative ruling.

7. With regard to article 11, which dealt with the distinction between "direct" and "indirect" claims for the purpose of the local remedies rule, the Special Rapporteur had noted that the provision was necessary so as to ascertain which cases fell within the scope of the draft articles. The basic principle was that the rule applied only where there had been an injury to a national of the State, i.e., where it had been "indirectly" injured through its national. It did not apply where there had been a direct injury to the State itself. As outlined in paragraph 201 of the report, the Special Rapporteur had proposed two criteria for determining the type of injury involved: (1) a preponderance test and (2) a sine qua non test. He had suggested that it might be sufficient to adopt only one of the tests. The Special Rapporteur had observed that other criteria had also been proposed in the literature, including the "subject" of the dispute, the "nature" of the claim and the nature of the remedy sought. Lastly, the Special Rapporteur had noted that three additional factors might be considered in deciding whether the claim was "preponderantly" direct or indirect and that those could be introduced into the text.

8. The Commission in general had supported article 11, which was considered to reflect prevailing practice. It had been noted, however, that further reflection was needed. It had been proposed to merge articles 10 and 11. It had also been observed that the terms "direct" and "indirect" injury were misleading. With regard to the two tests, the view had been expressed that the main difficulties related to the evaluation of the "preponderance" in a situation of a mixed claim. It had further been pointed out that there might be cases where a test of preponderance could not be applied because the injury suffered by the State was equivalent to that suffered by the individual. The view had also been expressed that the two tests should not be seen as applying cumulatively, nor should it be required that the preponderance test be applied before the sine qua non test.

9. Articles 9, 10 and 11 had been submitted to the Drafting Committee for further consideration. The Drafting Committee had not had time to consider any of the draft articles referred to it on the topic in the past two years, and it intended to address them at its next session. In that connection, he drew attention to paragraphs 27 and 28 of the report, on which the views of Governments were particularly welcome.

10. Chapter VIII of the report, concerning unilateral acts of States, dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of unilateral acts and the interpretation of unilateral acts, in the context of rules applicable to all such acts, regardless of their material content.

11. The Special Rapporteur proposed to proceed with a classification of unilateral acts based on the legal effects criterion. The Special Rapporteur had also expressed the view that silence in relation to unilateral acts could not be defined as a legal act in the sense being dealt with by the Commission. With regard to interpretative declarations, the Special Rapporteur had further indicated that where the declarations went beyond the obligations contained in the treaty, the declarations would become independent acts whereby a State could assume international commitments; those interpretative declarations would thus be included among the unilateral acts falling within the scope of the topic. On the contrary, countermeasures could not be considered within the same context because they constituted a reaction by a State, thus lacking the necessary autonomy, and because they were not expressly formulated with the intention of producing legal effects.

12. The Commission had been having difficulty in conceptualizing the topic; that had been evident in its

discussion. While some members considered the topic important and suitable for codification, others found it unfit for codification, especially in the light of the difficulties encountered in defining and classifying the acts. It had, however, been agreed that the topic should be approached in a less theoretical and more practical way. In general, there had been support for maintaining a restrictive definition of unilateral acts encompassing acts which created rights and obligations as a source of international law.

13. During the discussion in the Commission, comments had been made that in some cases, such as effective occupation, a series of unilateral acts were needed in order for legal effects to occur, and that therefore the analysis of the topic should not be restricted to single unilateral acts. Doubts had also been expressed with regard to the proposed classification of unilateral acts. Some members had shared the Special Rapporteur's view that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts. Others had felt that the provisions of the two Conventions were too general to be of use for that purpose. The point had been made that a reference to the object and purpose of a unilateral act should not be omitted for the purposes of interpretation.

14. The Commission had agreed with the Special Rapporteur that research in that area was very difficult. For that reason, the Commission had agreed with the recommendation of the Working Group that the Secretariat should circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts. The Commission urged Governments to reply to the questionnaire, which had been circulated to all States on 31 August, as soon as possible.

15. Chapter IX of the report dealt with other decisions and conclusions of the Commission. As requested by the General Assembly, the Commission had made an effort to implement cost-saving measures by organizing its programme of work in such a way as to set aside the first week of the second part of its session for the Working Group on the commentaries to the draft articles on State responsibility. The Working Group was composed of only 12 members of the Commission, thus resulting in a substantial saving through the non-attendance of the other 22 members.

16. As in the past, the Commission had cooperated with other bodies. The Commission had held an informal exchange of views with members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

17. As detailed in chapter IX, section E, the thirty-seventh session of the International Law Seminar had been held at the Palais des Nations with 24 participants of different nationalities, mostly from developing countries.

18. **Mr. Lavalle-Valdés** (Guatemala), referring to chapter VIII of the report, said that one difficulty which might arise with regard to the two new articles was that it might not be possible for all unilateral acts to be subject to the same rules of interpretation. There might be two levels of interpretation in that area. There was what might be called the first-level or basic interpretation, the purpose of which was to determine whether a particular unilateral act fell within the category of acts to be regulated — in other words, whether, in carrying out the act, the State had intended it to produce legal effects. A protest, for example, could only be made with the intention of producing legal effects, while in the case of a promise it would be necessary to determine whether or not it had a purely political motivation. The second level of interpretation, which came into play once it had been concluded that an act was intended to produce legal effects, consisted of dispelling any doubts as to the substance of the act. It was unclear whether the same rules of interpretation should apply to the two levels. Moreover, with regard to the second level of interpretation, the rules might vary depending on the type of act involved: for example, a waiver should be interpreted more strictly than a protest.

19. Turning to the question of the further treatment of the topic, he said that the Commission should refrain from elaborating any more articles until it had completed six priority tasks. First, it should agree on a typology, or more precisely, a list, covering all categories of unilateral acts of States, a task that should run parallel to the adoption of a suitable terminology. Second, the Commission should decide whether it was appropriate to add a residual, or open, category to the list, containing all unilateral acts that did not fit within the previous categories and that overall might be termed "innominate unilateral acts". Third, there was a need to determine whether all categories of specific acts which appeared on the list should be retained, or

only some of them. If it was agreed to include the residual or open category mentioned earlier, then acts which would thus be excluded would automatically fall into that category. Fourth, it had to be decided whether each of the specific categories of acts on the final list would be governed by the general rules featured in the final text, on the understanding that special rules would have to be devised for each category of acts to which the general rules did not apply. However, the residual category of innominate acts could only be governed by general rules. Fifth, for each of the specific categories of acts to which the general rules applied it would be necessary to determine whether the general rules would suffice, or whether special rules would be required to deal with some of their aspects. It was conceivable that a specific category of acts might be governed entirely by special rules. Sixth, agreement would have to be reached on the categories among which the general rules would be distributed. They would necessarily include the legal effects and revocability of unilateral acts.

20. Once those six tasks were completed, the seven articles already dealt with by the Commission could be provisionally adopted, and the Commission could proceed in the light of the criteria already followed, and the views of States, to develop the subsequent articles. In the final analysis, it must satisfy itself that the set of draft articles formed a sufficiently comprehensive and harmonious whole. Needless to say, the tasks he had described, and especially the first, were far from easy. There appeared to be general agreement that silence and estoppel should be excluded from the list; however, that would not do away with all the difficulties, because there was a considerable variety of views on the classification of unilateral acts. According to some, declarations and notifications should be included in the list, whereas he and others would prefer to exclude them.

21. **Mr. Hoffmann** (South Africa), speaking on behalf of the member States of the Southern African Development Community (SADC), said that diplomatic protection was directly related to the topic "State responsibility". The final draft articles on State responsibility left both the nationality of claims and the local remedies rule to be dealt with under the topic "Diplomatic protection". Codifying diplomatic protection was largely a matter of choosing between competing rules. In its traditional form, the rule of continuous nationality required a claimant State to prove that the injured individual was a national at the time of the injury, at the time when the claim was presented and throughout the period between the injury and the presentation of the claim. He agreed with the Special Rapporteur that there were serious concerns about the rule in its current form. It could cause great injustice where a person after sustaining an injury had undergone an involuntary change of nationality as a result perhaps of State succession or marriage. The content of the rule was itself unclear, because the concept of the date of the injury and the date of presentation of the claim had not been clarified. The rule was moreover difficult to reconcile with the Vatellian fiction underlying diplomatic protection, that an injury to a national was an injury to the State. According to that principle, the date of injury to the national should be the only critical date. Furthermore, the rule had not been consistently upheld by judicial decisions, doctrine or attempts at codification and was difficult to reconcile with developments in the field of human rights.

22. Despite those concerns, SADC believed that the rule of continuous nationality was still the best way of preventing individuals and corporations from changing nationality in order to find a State prepared to bring a claim on their behalf. The rule should be retained, but exceptions should be made where the individual had undergone an involuntary change of nationality following the injury.

23. The local remedies rule was an essential feature of diplomatic protection and a clearly accepted rule of customary international law. The Special Rapporteur had rightly decided to deal with it in several distinct articles. He agreed with the Commission's definition of the local remedies to be exhausted, including judicial and administrative remedies, but excluding political favours. However, article 10 should make it clear that the local remedy must be not merely available, but effective.

24. In practice, diplomatic claims were often mixed, involving both a direct injury to the State itself and an indirect injury to the State by virtue of an injury to its national, as in the case concerning *United States Diplomatic and Consular Staff in Tehran*. In such cases, it was difficult to lay down a general rule, but article 11, in the wording "preponderantly" and "but for the injury to the national", offered a test which might well prove satisfactory for the purpose.

25. The Commission had still to decide whether the local remedies rule was a rule of substance or of procedure. Moreover, the Special Rapporteur had queried whether the concept of denial of justice, which was clearly a primary rule, ought to feature in the draft. Another outstanding issue was the former "Calvo clause" and the question whether the Commission ought also to consider it.

26. While satisfied with the progress so far made on the draft articles, he hoped they would be confined to broad principles, so that they could be completed within the next five years.

27. **Mr. Kolby** (Norway), speaking on behalf of the Nordic countries, said he wished to address the topics "Diplomatic protection" and "Unilateral acts of States". The Nordic countries agreed with the Commission that the topic "Diplomatic protection" was of great practical significance; it had not become obsolete, despite the institution of dispute settlement mechanisms, and was ripe for codification. He welcomed the Commission's approach to the topic and to the general issues involved, and the Special Rapporteur's decision to tackle the most controversial issues at an early stage.

28. It was important to focus on practicalities, with a view to producing a kind of guide for practitioners. Rules of diplomatic protection were closely related to the basic principles and structure of inter-State relationships, helping to divide competences among States and to ensure respect for international law, without prejudice to other relevant rules such as those governing human rights or investment protection. Diplomatic protection was the prerogative of the State of nationality of the individual concerned, to be exercised at its discretion. The individual concerned should be regarded as a beneficiary of international law. However, the State had no obligation to present a claim on behalf of an injured national, nor was diplomatic protection a human rights institution.

29. Concerning article 9, the Nordic countries supported the view that the rule of continuous nationality enjoyed the status of customary international law, and that the current trend towards protecting individuals did not justify a change in the continuity rule. Diplomatic protection was a discretionary right of the State, which in exercising it was in reality asserting its own rights. The traditional rule as expressed in article 9 should be retained, but should be made more flexible and subject to exceptions for cases in which the individual would otherwise be unable to secure the protection of a State. The main exception should be an involuntary change of nationality.

30. He could agree with the rule in articles 10 and 11 on the exhaustion of local remedies, which was a well-established rule of customary law. However, the addition of "effective" to "available local legal remedies" in article 10 would better reflect the prevailing view in international law. Otherwise, the term "all" in reference to local remedies would be too broad, and would impose an excessive burden on the injured individual.

31. On the question of dual or multiple nationality, dealt with in article 6, the Nordic countries considered that the State with the dominant and effective link was the one entitled to act on behalf of its national. Such a State should have that right even where the protection was aimed against the State of the other nationality.

32. Turning to the topic "Unilateral acts of States", he explained that the Nordic countries could support the new draft articles (a) and (b), but felt that paragraphs 1 and 2 of article (a) could well be merged. However, there should be no need for a comprehensive set of rules on the topic. The Nordic countries would welcome a more focused approach, limiting the topic to a few general rules and a study of certain particular situations.

33. **Mr. Al Baharna** (Bahrain) said that diplomatic protection was one of the most controversial subjects in international law, partly because of the human rights dimension. However, it should not be treated as a human rights issue. Diplomatic protection was exercised basically at the discretion of the State to which the individual in question belonged, but it was not certain whether the State exercising it was seeking to ensure its own rights or to protect its nationals. Some claims were mixed. A flexible approach was needed, in order to strike an equitable balance between the interests of the State and those of its nationals. He believed the Commission could formulate new rules from the conflicting sources of law on the topic, and felt that it should adopt a liberal and progressive approach, rather than a conservative one.

34. Article 9 departed from the traditional rule of continuous nationality, which had been cast into doubt because of current trends in State practice,

jurisprudence and doctrine. The report of the Commission mentioned certain exceptions to the customary rule, relating to situations, such as an involuntary change of nationality, in which the individual would otherwise be unable to obtain the protection of a State. In article 9, the Special Rapporteur had chosen a new approach, attributing to the State whose nationality the injured individual had acquired since the injury the right to espouse a claim on his or her behalf, subject to certain safeguards in favour of the original State of nationality. He agreed that the rule of continuous nationality should be made more flexible, so as to avoid the exceptional cases in which injured individuals might otherwise have no means of presenting a claim. He favoured a middle course, maintaining the rule while making provision for involuntary changes of nationality and other cases where different nationalities were involved as a result of changes to the claim arising from inheritance and subrogation.

35. With regard to articles 10 and 11, dealing with the exhaustion of local remedies rule, which was well established as a customary rule of international law, it seemed from the Commission's report that the concept of the denial of justice would be embodied in the draft articles, with no distinction made between primary and secondary rules. His delegation favoured that approach, since no injury would be attributable to a State without proof that justice had been denied.

36. Article 10, paragraph 2, described local remedies as being "judicial or administrative courts or authorities whether ordinary or special". However, the article should contain a comprehensive definition of the remedies to be exhausted. The reference to "administrative courts or authorities" went beyond the scope of legal remedies, since such authorities could have a connection with the political organs of the State. Moreover, the phrase "ordinary or special" was ambiguous and needed clarification, while the phrase "local legal remedies" should apply strictly to judicial and administrative remedies, in accordance with the constitutional system of each State concerned, and not to non-binding discretionary or recommendatory decisions by public authorities or tribunals. His delegation also supported the suggestion made in the Commission that the word "effective" should be added to the phrase "all available local legal remedies" in paragraph 2, to accord with the usual terminology.

37. It was doubtful whether the reference to a "natural or legal person" in article 10, paragraph 1, was necessary, since in practice diplomatic protection was generally exercised on behalf of both categories of person. An explanation in the commentary would suffice. The question of when and at what period an individual's claim became an international claim also needed clarifying.

38. Article 11, on the exhaustion of local remedies, adopted the preponderance test which was supported by a number of cases decided by international courts, such as the *Interhandel* and the *Elettronica Sicula (ELSI)* cases. In accordance with that test, the Special Rapporteur drew a distinction between direct and indirect claims, stating that the rule applied only where there had been a direct injury to a national of a State and thus indirectly to the State. The exhaustion of local remedies rule would not, on the other hand, apply where there had been a direct injury to the State itself, since there the principles of State responsibility would apply. Although it was difficult to decide whether a claim was direct or indirect, that decision should be left to the court or tribunal.

39. The reference in article 11 to a "request for a declaratory judgement" could be considered an indication that an injury was direct so far as the State was concerned. The cases referred to in the Special Rapporteur's second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)) illustrated the fact that States sometimes sought both declaratory reliefs and compensation for injuries to their nationals. Although the report stated that the courts had to decide which was the preponderant factor, the article did not clearly reflect the precedents regarding the application of the preponderance test, especially in mixed cases. Nor did the article deal with cases where a request for a declaratory judgement or order might not apply. A separate article dealing with the two issues might be needed. Other factors such as the subject of the dispute, the nature of the claim and the remedy claimed, should also be considered when assessing whether a claim was predominantly direct or indirect. Indeed, there was a case for deleting the square brackets around the last sentence of article 11, although the sentence could with advantage be redrafted in order not to appear to be setting out examples rather than criteria. Lastly, article 11 appeared to reflect not only the preponderance test but also the sine qua non test. His delegation had no

objection to applying both tests so long as they helped to clarify the content of the article.

40. **Mr. Guan Jian** (China), referring to the topic "Diplomatic protection", noted that article 9, which was concerned with continuous nationality, had given rise to heated debate in the Commission. The Special Rapporteur had proposed abandoning the traditional rule of continuous nationality, since it was not favourable to the protection of the rights of individuals who had changed nationality in good faith, as a result, for example, of State succession, marriage or adoption. Most members of the Commission believed, however, that the rule deserved to be maintained, because it enjoyed the status of customary international law and effectively prevented "forum shopping". The key issue of the debate in the Commission had been the relationship between diplomatic protection and individual rights. In his view, diplomatic protection was, as a feature of international law, essentially a mechanism that regulated inter-State relations. The right of diplomatic protection belonged to the State, not to the individual. A necessary condition for a State to exercise that right was the existence of a legal relationship between the State and the individual, based on his or her nationality. His delegation therefore supported the majority view in the Commission that the rule of continuous nationality should be maintained and should become a basic standard rule governing the exercise of diplomatic protection, allowance being made for exceptional cases in which individuals had changed nationality involuntarily and been left with no diplomatic protection from any State. Such cases should be dependent on certain requirements: the acquisition of nationality leading to the loss of the original nationality should have been undertaken in good faith and there should be a substantial link between the individual and the subsequent nationality.

41. The exhaustion of local remedies rule, which was covered by article 10, had been widely accepted as part of customary international law and the draft submitted by the Special Rapporteur had not caused much controversy in the Commission, although it was to be hoped that the Drafting Committee would make further improvements.

42. With regard to article 11, diplomatic protection was exercised by a State when its national was injured. If an international claim was brought on the basis of a direct injury to a State rather than to its national, therefore, it went beyond the scope of diplomatic protection and the exhaustion of local remedies rule had no relevance. The text proposed by the Special Rapporteur thus seemed unnecessary, although his delegation was willing to listen to the views of others.

43. The diplomatic protection of companies should also be predicated on a legal relationship between the State and the company, based on its nationality. The latter could, as was the prevailing practice in many countries, including China, be based on where the company was incorporated or registered. The company, and its shareholders were, however, two different legal concepts. An injury to a company caused by a State did not necessarily give claim rights to shareholders. Only the State whose nationality a company had acquired through incorporating or registering in it had the right to give it diplomatic protection. In addition, it was not appropriate for a State whose nationals were shareholders to exercise diplomatic protection vis-à-vis the State in which the company was incorporated or registered. If an individual foreign shareholder of a company was injured by the internationally wrongful act of a State in which the company was incorporated or registered, the State of nationality of the individual shareholder had the right to provide diplomatic protection; but that applied to individuals rather than companies.

44. Having concluded its consideration of the draft articles on State responsibility, the Commission should give priority to the topic "Diplomatic protection" at its next session, since it was of both theoretical and practical significance for State-to-State relations.

45. With regard to unilateral acts of States, such acts were becoming increasingly important and the codification and progressive development of the law relating to them were essential, difficult though the process would be. After taking into account the views expressed by States, the Special Rapporteur had essentially grouped such acts into two categories: those whereby the State undertook obligations and those whereby it reaffirmed a right. The draft articles themselves might follow the same pattern. The classification of unilateral acts was desirable, but further consideration should be given to whether the two proposed categories were appropriate. Traditionally, unilateral acts consisted of promise, recognition, waiver and protest. Each had its own characteristics and legal effects and problems could arise if only two categories were retained. Promise, which could be listed as an act performed to fulfil an

obligation, and waiver, which could be taken to be a waiver of rights, presented no difficulty. Recognition and protest, on the other hand, were difficult to place in either of the proposed categories. Recognition was the acceptance of a fact or situation that related to the rights and obligations of concerned parties, while protest was the expression of disagreement with regard to a situation or a legal relationship. Thus an act to declare neutrality might represent a situation either where a State was fulfilling its obligation to be neutral or where it was confirming that its right to remain neutral was not to be violated, as in the case of a declaration of war. That being so, perhaps a third category should be added, namely, acts that accepted or rejected a certain situation or legal relationship. Traditional recognition, protest and declaration of neutrality could be listed in that category.

46. For the time being, the Commission should concentrate on formulating and considering the general rules applicable to all unilateral acts. Once the universality and significance of each kind of act had been established, rules concerning each category could be formulated according to the specific situation and needs, at an opportune time, with detailed provisions on the establishment of elements and legal validity. If classification was necessary at all, the Commission could give due consideration to his delegation's proposal and also to the Italian proposal for three categories of unilateral acts.

47. The interpretation of unilateral acts was very important, but it was not yet time to consider the issue. His delegation's initial view was that, when formulating the rules on interpretation, the Commission could refer to the relevant provisions of the Vienna Convention on the Law of Treaties. Specific circumstances should be taken into account when the true intention of the State taking the action was considered and a good faith interpretation should be made. At the same time, the particular characteristics of the unilateral act itself should be considered and the Vienna provisions should not be simply duplicated or copied.

48. **Mr. Peersman** (Netherlands) referring to the topic "Diplomatic protection", said that, at its fifty-second session, the Commission had discussed article 8, which provided for the exercise of diplomatic protection on behalf of stateless persons or refugees. In its response to the Commission's questionnaire on the topic, his delegation had provided an affirmative answer both to the question whether a State in which a stateless person had his or her lawful and habitual residence was entitled to protect that person and to the corresponding question with regard to refugees, although exercising diplomatic protection on behalf of a refugee vis-à-vis a State of which he or she was a national would probably not be very effective. From a human rights perspective, a system of protection analogous to diplomatic protection should be set up for the benefit of stateless persons and refugees.

49. Another item of particular interest to his delegation was the legal question of whether — subject to the requirement of continuous nationality — a State of nationality might exercise diplomatic protection on behalf of an injured national against another State of which he or she was a national, where the dominant or effective nationality was that of the former. According to the current text of article 6, the Commission had answered that question in the affirmative; and his delegation concurred with that approach. Although there were doubts as to the pertinence of the practice cited by the Special Rapporteur, article 6 represented a desirable solution and, if existing practice proved insufficient, the article could be regarded as an example of the progressive development of the law.

50. Some months earlier, his Government had raised with the Secretariat of the Council of the European Union's Working Party on Public International Law the issue of consular assistance to detainees with dual nationality whose dominant nationality was that of the State providing the assistance. The reason for raising the issue had been the problems experienced by Netherlands consular officers in a certain country in gaining access to Netherlands detainees whose dominant nationality was undoubtedly that of the Netherlands, although they also had the nationality of the State of detention. Although the issue related to consular assistance and not diplomatic protection, since the State of detention had — to the best of his knowledge — not committed any internationally wrongful act either in the administration of justice or with regard to the conditions of detention, the principle was the same: a dominant nationality could take precedence over a nationality with a weaker link.

51. With regard to the Commission's discussion of the exhaustion of local remedies, he noted that it had been suggested that the phrase "available local legal remedies" in article 10 required closer scrutiny and that the criterion of effectiveness was lacking. The

definition of local remedies should be as precise as possible. The word "available" should therefore be subject to further qualification with terms such as "legally" and "practically". Moreover, contrary to the view of some members of the Commission, he would favour adding the word "effective". The requirement to exhaust local remedies should be subject to strict conditions in order to prevent a defendant State from making an unjustified plea in that regard. His delegation looked forward to seeing how article 14, which would contain an overview of situations where there was no need to exhaust local remedies, would be formulated. Among the grounds for dispensing with that need, the Special Rapporteur had rightly included the absence of a voluntary link between the injured individual and the respondent State, for example where instances of transboundary pollution occurred.

52. **Mr. Horinouchi** (Japan) said that the draft guidelines on reservations to treaties might prove to be too detailed and complex for use. The conceptual distinctions between different categories would be meaningful only if they were accompanied by adequate clarification of the legal effects of each category. It was questionable whether late formulation of a reservation to a treaty really fell within the scope of the topic "Reservations to treaties". Japan shared the concern expressed by a number of States that if it became possible to make late reservations, the integrity of treaties could be placed in jeopardy and the regime of reservations established under the Vienna Convention on the Law of Treaties undermined. The presentation of a late reservation was not consistent with article 19 of the Vienna Convention. What was termed a reservation in the draft guidelines was in fact a declaration, an essentially new type of agreement or a modification to a treaty.

53. On the other hand, State practice did encompass some instances in which a reservation had been formulated after the conclusion of a treaty. Hence it was legitimate to study how that practice could be accommodated in the law of treaties. The act in question could be regarded as an agreement by the contracting States that the treaty concerned was modified only with respect to the State entering the late reservation and to the extent of the reservation, or with respect to that State and the Parties agreeing to such modification. Since States were free to conclude any agreements they wished, there was no reason why a State should not be allowed to derogate from some treaty obligations, provided that all the parties consented to it. It was, however, not axiomatic that failure to raise an objection within twelve months should be regarded as acceptance.

54. Since late reservations were undesirable and should be avoided whenever possible, the Commission should be requested to continue its study of the matter in order to determine whether there were enough examples to justify the formulation of general rules, whether such State practice came within a regime of specific treaties and, if so, whether the rules pertaining to them should be established in a text on reservations to treaties.

55. The draft articles on diplomatic protection should reflect the progressive development of the law, but they should not depart too far from customary international law. Although human rights constituted one of the most important areas of international law in need of strengthening, it was inappropriate to incorporate a human rights dimension in the draft articles on diplomatic protection, since it was an issue which should be addressed through primary rules.

56. It was important to reflect State practice when drafting articles on unilateral acts of States and it was necessary to determine which unilateral acts of States had legally binding effects. Since it might be difficult to cover every kind of unilateral act, it would be wise for the Commission to focus on the more highly developed areas of State practice.

57. **Ms. Cavaliere de Nava** (Venezuela), referring to chapter V of the report, said that the prevention of transboundary harm was of the utmost importance; carefully drafted, well-balanced articles on the topic would help to promote good relations between neighbouring States. The draft articles prepared by the Commission were, generally speaking, acceptable to her delegation. The activities covered by the article should not be enumerated, not even in a flexible, non-exhaustive list. The Commission's definition and qualification of the term "harm" was apt. Article 3, which should be considered in conjunction with articles 9 and 10, laid down the obligation of prevention, which was the cornerstone of the draft articles. The words "or at any event" implied that priority should be given to prevention. It was right to make the article broad in scope, so that the State of origin had wide discretion to take whatever action was necessary, including legislative and administrative measures. The obligation

of due diligence with regard to environmental protection was embodied in a number of international instruments and had been a factor taken into consideration in a number of cases heard by international tribunals.

58. Article 4 was equally important, because the obligation to cooperate was essential to risk prevention and provision had to be made for it in both the planning and the execution phases. Similarly, the obligation to seek authorization for an activity imposed by article 6, was vital and such authorization should be based on environmental impact studies, because the adoption of the requisite preventive measures depended on an assessment of potential transboundary harm. Article 8 complemented article 4. It was essential that the State of origin should notify other States of the potential risks of an activity, if they might be affected by it.

59. Article 19 was most apposite in that it embodied the principle of mutual agreement to dispute settlement machinery, although it also made provision for an impartial fact-finding commission which could present findings and recommendations. Her Government found that quite acceptable. Since the prevention of transboundary harm was closely bound up with the international responsibility of States, the Commission and States should view it in that context in the future.

60. With regard to chapter VII of the report, her delegation hoped that the Commission would submit some of the draft articles on diplomatic protection to the Drafting Committee for consideration the following year. The rule of continuous nationality dealt with in article 9 was still a valid rule of customary law. A person should not be able to request the diplomatic protection of a State unless there had been a continuous relationship between them between the time of injury and the time of presenting the claim, even if the nationality of the requested State had been acquired in good faith. The exceptions to the rule proposed by the Special Rapporteur, especially those relating to involuntary changes of nationality, deserved careful scrutiny. Such exceptions should be limited to cases in which nationality had been acquired involuntarily, for example, as a result of State succession.

61. The Commission should examine the international responsibility of international organizations and shared natural resources the following year. To that end, it should appoint two new Special Rapporteurs who should present reports in 2003. In 2002, the Commission could set up working groups to begin consideration of those topics and to guide the Special Rapporteurs.

62. **Ms. Telalian** (Greece) said that her delegation supported the draft articles on prevention of transboundary harm from hazardous activities, which contained principles of great value for the codification and progressive development of international law in that field. She welcomed the approach adopted in the preamble, which reconciled the freedom of States to carry on or permit activities involving risk within their territories with their duty not to cause harm in the territory of another State, an approach inspired by Principle 21 of the Stockholm Declaration, reaffirmed by Principle 2 of the Rio Declaration and confirmed by the International Court of Justice in its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* case.

63. There was no reason to limit the scope of article 1 to activities "not prohibited by international law" and those words should therefore be omitted. In view of the contents of article 18, the draft articles should apply to all activities giving rise to significant transboundary harm, irrespective of whether that harm was caused by a lawful activity or a breach of an international obligation of the State concerned.

64. The clarification given in the commentary to the effect that article 3 complemented articles 9 and 10 was most welcome, since the obligation to take appropriate measures included the obligation of due diligence and that of seeking solutions based on an equitable balance of interests. Article 6 was well-balanced and closely related to article 7, a key article, which incorporated principles established in the context of other environmental agreements and in State practice. It should, however, take account of the fact that the evaluation of the possibility of an activity causing significant transboundary harm was the object of the impact assessment.

65. Her delegation fully supported the notification and consultation procedures mentioned in articles 8 and 9, because those requirements were well-established principles reflected in international jurisprudence and incorporated in many international instruments designed to prevent transboundary harm. Article 10 enumerated some very important factors which might offer useful guidance to States participating in

consultations aimed at achieving an equitable balance of interests. It would, however, be better to combine paragraphs (a) and (c) and to include in the new paragraph the principle of precaution, which figured in many international instruments on environmental protection.

66. The dispute settlement procedures provided for in article 19 were unsatisfactory, because the highly complicated nature of environmental disputes called for a binding dispute settlement mechanism similar to that contained in article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

67. Greece supported the Commission's recommendation that the Assembly should elaborate a convention on the basis of the draft articles. The Commission should, however, remember that a comprehensive liability regime required not only the adoption of measures of prevention, but also the establishment of an adequate regime of compensation and should therefore embark upon a thorough examination of existing liability regimes and should try to elaborate its own general principles of State liability. Some major developments in international law had taken place in the context of civil liability agreements for transboundary injury, which ensured that compensation for damages would be available through a mechanism funded in a variety of ways. It was interesting to note that some of those liability conventions also provided for an international supplementary fund to be established by the financial contributions of member States, a certain amount of which was reserved for transboundary damage. All those possibilities ought to be explored.

68. On the issue of reservations to treaties, her delegation felt that although the possibility of making reservations could secure a broader participation of States in international human rights instruments, it could seriously impair their integrity, unity and effectiveness, undermine equality among States parties, and thwart the basic aim of harmonizing State action in the field of human rights protection.

69. Draft guideline 2.3.1 set forth a rule which would ensure legal certainty, given the serious effects of reservations on treaty relations; the rule was in keeping with the principle *pacta sunt servanda*, which would otherwise be circumvented if States could formulate reservations at any time.

70. With regard to draft guideline 2.3.2, her delegation noted that, although it reflected current practice followed by depositaries, that practice related to borderline cases; moreover, existing practice showed that late reservations were usually permitted in the context of treaties which specifically authorized reservations. Her delegation could support the guideline as long as resort to such reservations was made only in very exceptional cases. The practice of late reservations was hardly compatible with human rights treaties; the Commission should give further consideration to State practice in that field.

71. On the issue of interpretative and conditional interpretative declarations, her delegation supported the definition of interpretative declarations in guideline 1.2; although the Vienna Convention on the Law of Treaties was silent on the question of interpretative declarations, it was apparent that those declarations aimed only to interpret a treaty and not to modify its legal effect. The problem that arose was how to distinguish them from reservations, particularly when the intention of the author State was not clear. Her delegation felt that the legal effects of conditional interpretative declarations as defined in guideline 1.2.1 were the same as those of reservations and for that reason they should be treated as reservations, so that it was not necessary to deal with them specifically in the draft guidelines.

72. **Mr. Lobach** (Russian Federation), referring to the topic of "Reservations to treaties", said his delegation supported the work on the Guide to Practice, and agreed that it should be exclusively utilitarian, rather than normative, in nature, and should not contradict the letter and spirit of the Vienna Conventions. It hoped that the Commission would seek ways of accelerating work on the topic, which was of great practical interest.

73. His delegation agreed that conditional interpretative declarations were covered by the same rules as reservations and that it should be possible to have a single guideline on such declarations, which would provide that the reservations regime was applicable to them, mutatis mutandis. That approach was justified because conditional interpretative declarations were fairly rare, so that it was very difficult to make generalizations about them; however, the issue should not be finalized until the Commission had considered the effects of reservations and of conditional interpretative declarations.

74. On the issue of late formulation of reservations, his delegation believed that the Guide to Practice should not contradict the regime established by the Vienna Conventions. It would be unwise to include provisions in that respect since that could encourage late formulation of reservations and have an adverse effect on the observance of the basic principle *pacta sunt servanda*. In any case, such declarations were rarely found in practice and, as a rule, only in cases when such a possibility was directly envisaged in the treaty.

75. The norm that a reservation could not be formulated after a State's expression of its consent to be bound by a treaty was not absolute, and States parties could always provide for the possibility of late reservations. Late reservations were of interest both at the doctrinal level, and from the point of view of the study of conventional practice. A number of issues arose in that connection which had not been covered in the commentary, in particular, the issue of whether the absence of objections to the late formulation of reservations was applicable only to a concrete situation, or could be interpreted broadly as consent in principle, allowing all States parties to formulate such reservations at a later stage. The second alternative would raise the question of making amendments to the text of a treaty, which would have to be in writing, and of whether the treaty would be amended for all or only some of its parties. In that context, the question raised in paragraph (21) of the commentary as to whether a distinction should be made between the absence of objections to the formulation of late reservations and the adoption of reservations within the sense of the Vienna Conventions needed to be considered in more detail.

76. On the role of the depositary, his delegation believed that guideline 2.1.7 should be maintained in its current form, reproducing the formulation of the corresponding articles of the Vienna Conventions. The issue of whether the depositary was authorized to refuse to transmit notifications of reservations had already been considered at the time of the drafting of the Vienna Convention on the Law of Treaties, and as a result, a reference to the right of the depositary to consider the validity of reservations had been removed from article 77 of the draft Convention. His delegation believed that, unless otherwise provided in a treaty, the depositary could not assume the right to make decisions as to whether a reservation corresponded to the purpose and objectives of a treaty, since that was within the competence of the contracting States. However, in cases where a treaty prohibited reservations or certain types of reservations, the depositary was entitled to reject documents containing such reservations, after informing the State concerned of the reason for refusal.

77. With regard to the topic "Diplomatic protection", one of the key questions was whether the Commission should be concerned primarily with codification or with the progressive development of international law. His delegation felt that, at least at the current stage, the Commission should focus on codification. Diplomatic protection was one of the oldest and least studied areas of international law, and the adoption of a conservative approach, based on a comprehensive study of State practice and judicial decisions, would be the best, and would make it possible to formulate rules acceptable to the majority of States.

78. With regard to article 9, the rule of continuous nationality had been widely confirmed in judicial practice and was an established norm of customary international law; even the positive trend to ensure protection of the rights of individuals could hardly serve to justify changing that rule. However, observance of that rule should not lead to unjust results: it was unacceptable that a person who had undergone an involuntary change of nationality should be deprived of diplomatic protection. His delegation supported the idea of maintaining the traditional rule, along with special exceptions, particularly for cases of involuntary change of nationality.

79. His delegation supported the inclusion of articles 10 and 11, which related to one of the most complex and contradictory aspects of diplomatic protection. The definition of local legal remedies seemed adequate and did not need further clarification or expansion, at least in article 10 itself; that formulation meant that such remedies must be available in practice. The criterion of effectiveness could give rise to subjective interpretation.

80. His delegation supported the continued consideration of the topic "Unilateral acts of States", and shared the view that a more pragmatic approach was needed. It believed that the Special Rapporteur's intention to classify such acts on the basis of their legal effects was generally correct. However, the inclusion of interpretative declarations was questionable;

although such declarations gave rise to additional obligations for the author, they differed from other unilateral acts because they were treaty-based, and should clearly be considered in the context of reservations. The object and purpose of a unilateral act needed to be taken into account for the purposes of interpretation; that was the foundation for one of the basic rules of interpretation, the rule of effectiveness, the significance of which had been stressed on a number of occasions by the International Court of Justice.

81. With regard to new topics, his delegation believed that the Commission should take up the topic "Responsibility of international organizations", but felt that it would be premature to take up the issue of the fragmentation of international law.

82. **Ms. Odaba** (Kenya) said that her delegation welcomed the Commission's completion of its work on State responsibility, but would have liked more time to study the draft articles and the commentaries thereto. Her Government supported the Commission's recommendation that the General Assembly should take note of the draft articles in a resolution and should consider, at a later stage, the possibility of convening an international conference of plenipotentiaries; it urged the General Assembly to take action on the draft articles as soon as possible, given the importance of the subject.

83. On the topic "Reservations to treaties", her delegation believed that the existing regime of reservations set forth in the Vienna Conventions should not be modified; the guidelines should aim to fill any lacunae that might exist and further clarify the scope of application of the provisions of the Vienna Conventions.

84. With regard to conditional interpretative declarations, her Government agreed that there was a need to study the effects of reservations and of conditional interpretative declarations before determining whether the guidelines relating to reservations should apply mutatis mutandis to conditional interpretative declarations. Current State practice did not draw a clear distinction between conditional interpretative declarations and reservations.

85. Her delegation called for caution in endorsing a regime that permitted the formulation of late reservations. Although the principle followed established practice, it ran counter to the provisions of the Vienna Conventions, and the inclusion of guidelines on the subject would have the undesired effect of encouraging late reservations. Further study was needed in that respect. In the long run, it might become necessary for States to consider the question of whether late formulation of reservations would be preferable to total denunciation. Her delegation reiterated the longstanding principle that States had an obligation to ensure that their reservations were consistent with the purpose and object of the treaty.

86. Her delegation supported the view that the power of the depositary to reject reservations to treaties should be limited to situations where there was a prima facie prohibition of reservations or of reservations other than specified reservations as stipulated in article 19 of the Vienna Convention on the Law of Treaties. However, the determination of whether or not a reservation was incompatible with the object and purpose of the treaty should be left to the contracting States. Her delegation felt that the role of the depositary should be limited to communicating to the States concerned the contents of the reservations; any questions on the validity of such reservations should be left to the contracting parties.

87. With regard to the topic "Diplomatic protection", her delegation did not wish to erode the importance of the rule of continuous nationality, which was a longstanding rule of customary international law. It therefore supported the view that article 9 should be recast to give greater emphasis to that rule, while at the same time providing certain exceptions relating to State succession, marriage and adoption. It agreed that a distinction should be drawn between voluntary and involuntary change of nationality, which could be used as a guideline for drawing up such exceptions and serve to reduce incidents of "claim shopping" and "forum shopping".

88. On the question of diplomatic protection for legal persons, her delegation noted that although general rules of international law supported the view that a State could exercise diplomatic protection only if a company was incorporated or registered in its territory, State practice was not clearly established; it therefore wished to study current trends and evolving practice before giving substantive comments to the Commission.

The meeting rose at 5.50 p.m.